Supreme Court, U.S.
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Case No.

THE SUPREME COURT OF THE UNITED STATES
OCTOBER, 1994 TERM

J. Michael Hayfield and Ernest A. Husarik,
Petitioners

v.

Margaret McIntyre,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. DID THE COURT OF APPEALS ERR IN ASSUMING THE EXISTENCE OF A CONSTITUTIONAL RIGHT NOTWITHSTANDING THAT THE RESPONDENT WAS ENGAGED IN CONCEDEDLY UNLAWFUL ACTIVITY AT THE TIME OF THE ALLEGED CONDUCT.

II. DID THE COURT OF APPEALS ERR IN DENYING QUALIFIED IMMUNITY TO THE PETITIONERS IN A CASE THAT RECOGNIZED FOR THE FIRST TIME THE LEGAL RULES UPON WHICH THE ALLEGED LIABILITY IS BASED.

III. DID THE COURT OF APPEALS ERR IN DENYING QUALIFIED IMMUNITY FOR A THREAT TO CALL THE POLICE WHERE PETITIONERS HAD PROBABLE CAUSE TO BELIEVE THAT UNLAWFUL ACTIVITY WAS AFOOT.

IV. DID THE COURT OF APPEALS ERR IN FINDING A CONSTITUTIONAL DEPRIVATION WHERE PETITIONERS ALLEGEDLY TOOK SOME BUT NOT ALL OF THE RESPONDENT'S LEAFLETS SUCH THAT RESPONDENT RETAINED

SUFFICIENT LEAFLETS TO ENGAGE IN UNLIMITED DISTRIBUTION.

V. DID THE COURT OF APPEALS ERR IN DENYING QUALIFIED IMMUNITY ON THE BASIS OF A HIGHLY ABSTRACT AND GENERAL FORMULATION OF THE ASSERTED RIGHT CONTRARY TO THIS COURT'S HOLDING IN ANDERSON V. CREIGHTON.

VI. DID THE COURT OF APPEALS ERR IN ITS APPLICATION OF THE PROPER STANDARD FOR SUMMARY JUDGMENT WHERE THE PETITIONERS PRODUCED AFFIRMATIVE EVIDENCE THAT THE RESPONDENT SUFFERED NO CHILLING IN FACT AND THUS CANNOT SHOW SHE SUFFERED ANY DEPRIVATION OF RIGHTS.

LIST OF PARTIES

Plaintiffs in the court below were Maureen Hansen, Margaret McIntyre, Gordon Rood, Carl Huffman, Carolyn Ward, Raymond L. Brown, Sr., Sue A. Bresee, Jerry D. Bresee, Lou Waggoner, Jack P. Keller, and Margie Bean.

Defendants in the court below were the Westerville City School District Board of Education, Debbie Collins, Don W. Miller, Donna Baker, Dave Coffman, Tom Fawcett, Ernest A. Husarik, J. Michael Hayfield, Richard Tiburzio, T. Smith, R. Bailey, P. Ross, and the City of Westerville.

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Case No.

THE SUPREME COURT OF THE UNITED STATES
OCTOBER, 1994 TERM

J. Michael Hayfield and Ernest A. Husarik,
Petitioners

v.

Margaret McIntyre,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on November 7, 1994.

OPINIONS BELOW

Hansen v. Westerville City School District Board Of Education, Case No. C-2-89-6007 Feb. 19, 1993 (Appendix A).

Hansen v. Westerville City School District Board Of Education, Case Nos. 93-3231/3303 Nov. 7, 1994 (Appendix B), Petition For Rehearing And Suggestion Of Rehearing En Banc denied Jan. 19, 1995 (Appendix C).

STATEMENT OF JURISDICTION

On November 7, 1994, the Sixth Circuit Court of Appeals entered a decision affirming in substantial part the decision of the lower court granting summary judgment in favor of the Westerville City School District Board of Education. The Sixth Circuit reversed that portion of the District Court's decision with respect to the Petitioners Dr. Ernest Husarik and J. Michael Hayfield in which the lower court concluded that: (1) Respondent McIntyre had no constitutionally protected right (2) her speech was not "chilled" in any way; and (3) that the Petitioners were entitled to qualified immunity. On January 19, 1995, the Sixth Circuit denied the Petitioners' Petition For Rehearing And Suggestion Of Rehearing En Banc.

This Court has jurisdiction to hear this petition pursuant to 28 U.S.C. 1254(1).

Jurisdiction in the district court was proper pursuant to 28 U.S.C. § 1331.

STATEMENT OF THE CASE

Public officials, who are often called upon to exercise discretion in the execution of their official duties, must not be subjected to suit where they act in accordance with state law based upon a reasoned and accurate understanding of that law. This is especially true where, as here, their actions do not result in the deprivation of any right secured by the constitution. The decision of the Sixth Circuit Court of Appeals subjects the Petitioners to suit for their alleged interference with concededly unlawful activity. Further, without citation to any established precedent, it denied qualified immunity to Petitioners for allegedly taking several, but not all, of Respondent McIntyre's leaflets from her and for an alleged threat to report to the police conduct which Petitioners had reason to believe was unlawful, even though the police were never called, and despite the lack of evidence supporting Respondent's claim that, even assuming the existence of a constitutional right, she suffered a deprivation of her First Amendment rights.

Petitioners, Dr. Ernest Husarik and Mr. J. Michael Hayfield, are the Superintendent and the former (i.e., retired) Assistant Superintendent, respectively, of the Westerville, Ohio City School District. During 1988, the Westerville Board of Education had placed on the ballot the issue of an operating (tax) levy to support the public schools. On April 27 and 28, 1988, Dr. Husarik and Mr. Hayfield encountered Respondent, Margaret McIntyre, distributing leaflets in opposition to the levy. It is undisputed that Mr. Hayfield

read the leaflet and informed Respondent that it violated Ohio election laws. It is alleged that Mr. Hayfield took some of Respondent's leaflets and threatened to call the police. It is undisputed, however, that: (1) Respondent retained sufficient leaflets to continue her distribution that evening; (2) Respondent in fact continued to distribute leaflets that evening after the alleged incident; (3) the police were never called; (4) the Petitioners were without authority to effect an arrest and neither suggested they had such authority nor attempted to do so; (5) Respondent distributed leaflets the following evening; and (6) Respondent never refrained from engaging in any political activity as a result of the alleged conduct of Petitioners. It is also undisputed that Respondent's distribution of leaflets was subsequently determined by the Ohio Supreme Court to have violated Ohio Rev. Code § 3599.09. McIntyre v. Ohio Elections Comm'n, 67 Ohio St. 3d 391, 618 N.E. 2d 152 (1993), cert. granted, 114 S. Ct. 1047, (Feb. 22, 1994), motion to dismiss denied, 114 S. Ct. 2670 (June 13, 1994). The constitutionality of the Ohio statute is currently being considered by this Court and a ruling is expected shortly.

Despite these undisputed facts, the pendency of McIntyre v. Ohio Elections Comm'n before this Court, and over a strong dissent by Judge Batchelder, the Sixth Circuit Court of Appeals denied Petitioners' claim of qualified immunity, apparently assuming that the Respondent was engaged in constitutionally-protected conduct, and ruled that a question of fact exists whether the Respondent's free speech rights were in fact chilled, i.e., whether she suffered a

deprivation of First Amendment rights. Slip Op. at 18, 19. It is respectfully submitted that the Court's (i.e., majority's) decision is erroneous because: (1) it concluded that dissemination of literature in violation of state election law is protected activity; (2) it incorrectly applied the applicable standard for qualified immunity; (3) it denied Petitioners qualified immunity from suit with regard to rights first recognized in the instant decision of the Sixth Circuit Court of Appeals; and (4) improperly applied the standard for summary judgment.

ARGUMENT

I. The Sixth Circuit Erred In Assuming That The Respondent's Leafleting Activity Was Constitutionally Protected.

The Court's consideration and denial of qualified immunity to Dr. Husarik and Mr. Hayfield is erroneous because Petitioners' alleged activities did not deprive Respondent of any right secured under the Constitution. In Siegert v. Gilley, 500 U.S. 226 (1991), this Court ruled that the District Court for the District of Columbia erred in even reaching the issue of qualified immunity where it erroneously assumed the existence of a constitutional violation. "A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all." Id. at 232. Failure to make

this threshold showing means that a plaintiff loses at an "analytically earlier stage of the inquiry into qualified immunity," thus obviating the need even to consider the issue of qualified immunity. Id. at 227.

In this case, the Sixth Circuit failed to consider or discuss that, according to the Ohio Supreme Court, Ms. McIntyre's conduct violated Ohio Rev. Code § 3599.09 at the time of the alleged interference with her distribution of election materials. See McIntyre v. Ohio Elections Comm'n, 67 Ohio St. 3d 391, 618 N.E.2d 152 (1993). Federal courts of appeal have held that unlawful conduct is not constitutionally protected merely by virtue of the fact that the unlawful activities involved elements of speech.[1] Should this Court uphold the validity of the Ohio statute under the Constitution, then the Respondent's conduct will be deemed to have been unlawful. Yet the Sixth Circuit decision will force the Petitioners to stand trial and face potential personal liability for their alleged interference with the Respondent's unlawful conduct. Unlawful conduct is not constitutionally protected and cannot, therefore, provide a basis for § 1983 liability. Cf. Siegert v. Gilley, 500 U.S. 226 (1991). Therefore, should this Court rule in McIntyre v. Ohio Elections Comm'n that the Ohio statute is constitutional, then the Respondent's prima facie case under § 1983 will fail. Under such circumstances, summary reversal of the Sixth

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[1] See, e.g., Catalytic, Inc. v. Monmouth & Ocean City Bldg. Trade Council, 829 F.2d 430, 436 (3rd Cir. 1987) (no First Amendment protection for union's leafleting activities in violation of NLRA); Welch v. United States, 750 F.2d 1101, 1108 (1st Cir. 1985) (no First Amendment protection for violation of federal tax laws).

Circuit's decision is proper. Otherwise, the Respondent may obtain a damage award against the Petitioners for their alleged interference with her unlawful conduct. Accordingly, this Court should grant this Petition to review the Sixth Circuit's failure to apply Siegert and to clarify the evident confusion within the federal circuits as to the proper application of the standard as set forth in that case. See DiMeglio v. Haines, 45 F.3d 790, 795-97 (4th Cir. 1995) (collecting cases reflecting split within the circuits).

II. The Court Erred in Denying Dr. Husarik and Mr. Hayfield Qualified Immunity Because This Case Is One Of First Impression And The Contours Of The Rights They Are Alleged To Have Violated Were Neither Clear In 1988 Nor Foreshadowed By Relevant Case Law.

Even if this Court does strike down the Ohio statute, the Sixth Circuit's decision reversing the District Court's order granting summary judgment to Dr. Husarik and Mr. Hayfield on the issue of qualified immunity is erroneous because this case is one of first impression; the Sixth Circuit's opinion effectively recognizes new federal rights for the first time while at the same time denies Petitioners qualified immunity because of their failure to anticipate the announcement of those rights.

This Court has held that whether a public official is protected by qualified immunity generally depends upon the objective legal reasonableness of the action in question

assessed in light of the legal rules that were "clearly established" at the time it was taken. "If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he be forced to 'know' that the law forbade conduct not previously identified as unlawful." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Thus, "[t]he contours of the right must be sufficiently clear that a reasonable officer would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987). "If there is a 'legitimate question' as to whether an official's conduct constitutes a constitutional violation, the official is entitled to qualified immunity." Wiley v. Doory, 14 F.3d 993, 995 (4th Cir. 1994) (Powell, J.).

Other circuits recognize that qualified immunity should be applied in cases of first impression. Where a legal rule is applied in case for the first time it cannot be clearly established at the time the alleged conduct took place. Calhoun v. New York State Div. of Parole Officers, 999 F.2d 647, 654-55 (2d Cir. 1993). For the reasons set forth below, the Petitioners respectfully request that this Court grant the Petition to resolve the evident conflict between the Sixth and Second Circuits.

A. The Court Erred As A Matter Of Law In Determining That A Mere Threat To Call The Police Which Was Never Carried Out Is Sufficient To Cause A Deprivation Of Rights.

The Sixth Circuit creates for the first time the possibility of liability for a public official for merely threatening to call the police if the official's purpose in so doing was to discourage someone from expressing his or her views, notwithstanding that the official had probable cause to believe, and in fact correctly believed that illegal conduct was afoot. Slip Op. at 18-19, citing NAACP v. Button, 371 U.S. 415, 433 (1963) and Sloman v. Tadlock, 21 F.3d 1462, 1469 (9th Cir. 1994). As Judge Batchelder in her dissenting opinion below cogently points out, the cases cited in the Majority's opinion do not involve a mere threat to call the police which is never carried out. Dissenting Opinion at 1-3.[2]

Yet none of the cases relied upon by the Sixth Circuit clearly establish that a threat under such circumstances violates any constitutional right. NAACP v. Button involved a challenge to a Virginia statute on the basis that it was overly broad and vague, potentially inhibiting the plaintiffs' First Amendment freedoms of speech, association, petition and assembly. The alleged threat in the instant case to call the police, which threat was never carried out, clearly does not present the inhibitory effect of the overbroad and vague statute in Button. Particularly for the purposes of

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[2] To the contrary, courts have recognized that a mere threat by a police officer that he was "going to get" a plaintiff -- a seemingly more egregious "threat" -- is insufficient to state a claim for a violation of the plaintiff's constitutional rights. See Emmons v. McLaughlin, 874 F.2d 351, 353 (6th Cir. 1989) (affirming decision granting summary judgment to defendants); cf. Goldschmidt v. Patchett, 686 F.2d 582, 585 (7th Cir. 1982) (rejecting claim based upon a prosecutor's sending of a letter informing plaintiff (an attorney) that his advertising appeared to contravene state law, noting that "[t]he prosecutor's action here can be characterized at most as a warning or a threat") (emphasis supplied).

determining the issue of qualified immunity, it is not apparent that a reasonable public official in the position of Dr. Husarik and Mr. Hayfield would recognize that the evils associated with the statute struck down in Button were inherent in their alleged threat to call the police concerning Respondent's distribution of campaign materials which Petitioners had reason to believe violated Ohio law.

Nor does Sloman v. Tadlock support the denial of qualified immunity to Dr. Husarik and Mr. Hayfield in this case. In Sloman, the plaintiff established that a police officer, after warning the plaintiff that he was in violation of the traffic laws, subsequently issued a citation to plaintiff for that violation and later participated in the arrest of the plaintiff for trespass. One of the defendants in Sloman was a police officer, an official who had it within his power to arrest or issue citations to the plaintiff. In the instant matter, it is undisputed that neither Dr. Husarik nor Mr. Hayfield had the ability to arrest or cite Respondent for an election law violation, or indeed, any other violation of law. Further, the police officer in Sloman actually cited plaintiff for a violation of law and later participated in the plaintiff's arrest, and the civilian defendant in that case actually had signed a citizen's complaint that led to the arrest of the plaintiff. See Sloman, 21 F.3d at 1465-66, 1474. Here, by contrast, the record demonstrates unequivocally that Petitioners never called the police concerning Respondent's activities.[3]

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[3] Additional evidence established in Sloman serves to distinguish it from the case at bar. In Sloman, there was evidence presented that the plaintiff was not violating the traffic laws for which he was issued a

Moreover, even if Sloman provided support for the court's decision, it was decided in 1994. The relevant inquiry here, however, is whether the law in 1988 was such that the Petitioners should have known that they were violating the Respondent's clearly established rights. Thus, the decision below is contrary to this Court's pronouncements in Harlow v. Fitzgerald and Anderson v. Creighton.

The Sixth Circuit's decision to deny qualified immunity under the circumstances of this case is particularly incongruous in light of the result in a case upon which it relied, Mozzochi v. Borden, 959 F.2d 1174 (2d Cir. 1992), in which an official who had not merely "threatened to call the police" but had instituted a prosecution against an individual allegedly in retaliation for his exercise of First Amendment rights was granted qualified immunity.

As Judge Batchelder notes in her dissent, "...a threat to call the police, even when made by public school officials on public school property, is [not] the equivalent to a threat of arrest or prosecution, such that these [school officials] should have known that when they threatened to call the police they were violating [Respondent's] First Amendment rights." Dissenting Opinion at 4. A rule of law that would

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citation by the defendant police officer, and further, that the trespass charge against the plaintiff was groundless. Here, it is undisputed that Respondent subsequently was adjudged by the Ohio Supreme Court to have violated the Ohio election laws. Finally, unlike Sloman, there is no evidence in this matter that Respondent's expression was "chilled" by Petitioners' alleged conduct. Cf. Sloman, 21 F.3d at 1470.

deny qualified immunity to school officials under these circumstances indeed "set[s] an alarming precedent," Dissenting Opinion at 4, for it creates a new rule of liability for merely threatening to call the police while denying public officials qualified immunity for not anticipating the new rule's announcement by this Court.[4]

Federal courts have generally granted qualified immunity in cases of first impression. See, e.g., Greenberg v. Kmetko, 922 F.2d 382, 385 (7th Cir. 1991) ("the law of qualified immunity, as it has developed in this circuit, has tended to find qualified immunity in almost every case of first impression.") (Cudahy, J., concurring). The Sixth Circuit's failure to recognize that novel legal issues are peculiarly appropriate for the granting of qualified immunity is at odds with the cases from this Court as well as in other circuits.

B. The Court Erred In Determining That Petitioners Husarik And Hayfield Should Have Known That If They Took Any Of Respondent's Materials, They Were Violating Her First Amendment Rights.

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[4] Moreover, as a matter of public policy, public officials, especially school officials, cannot be subject to § 1983 liability each time they threaten to invoke the proper civil authority when they reasonably and correctly believe that illegal conduct is afoot. See, e.g., Eckstein v. Cullen, 803 F. Supp. 1107, 1117 (E.D. Va. 1992) (threat by prosecutor to invoke judicial intervention not violative of First Amendment rights of bookstore owner).

As Judge Batchelder emphasizes in her dissenting opinion, there is no precedent which would support a denial of qualified immunity to Dr. Husarik and Mr. Hayfield on the theory that they should have known that by taking some of Respondent's materials they were violating her First Amendment rights. Dissenting Opinion, at 4.[5]

The court below analogized the facts of this case to those presented in Glasson v. City of Louisville, 518 F.2d 899, 904 (6th Cir.), cert. denied, 423 U.S. 930 (1975). In Glasson, a police officer, pursuant to a departmental policy to confiscate and destroy all signs which the police deemed to be "detrimental" or "injurious" to the President or to the United States, seized a poster critical of the President and destroyed it. Unlike the facts in the instant matter, the police officer in Glasson destroyed the plaintiff's only poster, which effectively prevented her from communicating her message to those in attendance at the President's motorcade. Here, at most, Petitioner Hayfield is alleged to have taken only a few of Respondent's leaflets, and it is undisputed that Respondent continued to pass out her leaflets to other passersby on the two dates in question. It also bears emphasis that in Glasson, the law enforcement officer who destroyed the plaintiff's poster would have had the power to arrest her if she resisted his actions, while in the instant matter, Petitioner Hayfield had no such authority, and indeed never even called the police concerning Respondent's activity. See also Dissenting Opinion at 2.

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[5] There is no record evidence that Petitioner Dr. Husarik ever took any of Respondent's leaflets.

Glasson, the very precedent which the Court cites in support of its conclusion that there was a "clearly established" right of Respondent not to have any of her materials taken such that Petitioners Hayfield and Husarik should have known that their conduct in 1988 was unlawful, fails to inform the reader that public officials could be held liable for taking only a few of an individual's materials and the individual is not prevented from communicating her message to the public.

C. Petitioners Are Entitled To Qualified Immunity Because, At The Time Of The Alleged Incident, Respondent's Activity Was Unlawful Under Ohio Law.

Under Ohio law as it existed in 1988, and as of this filing, the Respondent's conduct was unlawful. In State v. Babst, 104 Ohio St. 167, 135 N.E. 525 (1922), the Ohio Supreme Court stated that the substantially identical precursor to Ohio Rev. Code § 3599.09 "in its operation does not restrain or abridge the liberty of speech as guaranteed by Section 11, Article I, Bill of Rights [i.e., the Ohio Constitution's First Amendment analogue] but is regulatory in nature, and intended to prevent abuse of the right." This conclusion was confirmed by the Ohio Supreme Court's reaffirmation of this controlling law by a 6 to 1 margin in McIntyre v. Ohio Elections Comm'n., 67 Ohio St. 3d 391, 618 N.E.2d 152 (1993). Because clearly established state law did not confer any right upon the Petitioner in 1988,

it is plainly unfair to subject the Respondents to potential liability for subsequent changes in the law which could not have been foreseen. Thus, if the Ohio statute is now struck down, Dr. Husarik and Mr. Hayfield may be held to answer in damages for a change in the law occurring some seven years after the alleged incident.

This result is especially unjust given that, at the time it occurred, the Petitioners acted in accordance with an accurate understanding of the law as it then existed. Qualified immunity is meant to protect "all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L.Ed. 2d 271 (1986). Ironically, the Sixth Circuit's decision would deny immunity to these Petitioners not because they knew too little, but rather because they knew too much. To impose liability on them based on their accurate knowledge of the law imposes an intolerable burden on public officials. Accordingly, the denial of qualified immunity to Mr. Hayfield and Dr. Husarik, when they certainly had reasonable grounds to believe that Respondent's materials violate the election laws, flatly contradicts the rule pronounced in Anderson v. Creighton.

III. The Court Below Misconstrued This Court's Rule Announced In Anderson v. Creighton That Clearly Established Rights Are To Be Determined By Reference To Operative Facts Underlying The Relevant Claim For Relief.

This Court warns against applying the test of what is "clearly established law" in terms that are too general or abstract, noting that such a formulation will "convert the law of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging extremely abstract rights." Anderson v. Creighton, 483 U.S. 635, 639-40 (1987). The problem with such an approach is that it tends to "destroy 'the balance that [the Supreme Court] cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties,' by making it impossible for officials 'reasonably [to] anticipate when their conduct may give rise to liability for damages.'" Id at 639 (citations omitted). For this reason, federal law concerning qualified immunity requires that "the right alleged to have been violated must have been 'clearly established' in a more particularized, and hence more relevant sense." Id. at 640.

The Sixth Circuit, though, framed the issue respecting qualified immunity in very general terms, as follows:

> Mrs. McIntyre's right to distribute political literature was clearly established at the time of these events. A reasonable school official would have known that he could not interfere with a citizen's campaign efforts against a tax levy by confiscating her materials and threatening to call the police.

Opinion at 19. Posed in that manner, "the question answers itself." Compare Mozzochi v. Borden, 959 F.2d 1174, 1178 (2d Cir. 1992) (concluding that a similarly worded framing of the issues was too general). Instead, the relevant standard must account for the fact that the materials which Respondent was distributing were clearly in violation of the state election laws as they existed at that time.

Additionally, as this Court has recognized, whether the official's actions are objectively reasonable is determined by reference to federal constitutional, statutory or case law existing at the time the alleged violation occurred, including decisions of the Supreme Court, the Sixth Circuit Court of Appeals, or the Ohio Supreme Court. Anderson v. Creighton, 483 U.S. 635, 639. Although it is not required that the "action in question [be] previously held unlawful," its unlawfulness in light of pre-existing law must be apparent, and the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates the law." Id. at 640.

For the foregoing reasons, the issue respecting qualified immunity should have been framed as follows: whether, in 1988, it was clearly established that an individual had a First Amendment right to disseminate materials which violated state election laws, and, even if such a right is determined to have existed, whether a reasonable school official would have known that taking several copies of the individual's materials and threatening to call the police, even when there was no deterrent effect on the individual's speech,

the individual's medium of speech was not impaired, and police were not contacted, would violate the individual's rights. Dr. Husarik and Mr. Hayfield respectfully urge this Court to find that such a right was not clearly established in 1988, and that in any event, reasonable public officials would not reasonably have known that the conduct at issue in this case violated such a right. In addition, the Petitioners respectfully request that the Court grant their Petition to clarify the rule as set forth in Anderson v. Creighton

IV. Under The Applicable Standard For Summary Judgment, Respondent Cannot Prevail At Trial On Her Claim For An Alleged "Chilling" Of Her First Amendment Rights.

Even if Respondent had First Amendment rights in this case, and even if qualified immunity were not properly invoked in this case, the Sixth Circuit improperly applied the applicable standard for summary judgment in failing to uphold dismissal of Respondent's claims. The Sixth Circuit reversed the District Court and ruled that an issue of fact remains concerning whether Petitioners' conduct deprived Respondent of a constitutionally protected right. Slip Op. at 18. The Court correctly noted that "in order to succeed at trial . . . [the Respondent] will have to establish that her expression was in fact deterred or chilled by the defendants' conduct." Slip Op. at 19 (emphasis added).[6] Under Fed. R. Civ. P. 56, a nonmovant must " 'present affirmative evidence to defeat a properly supported motion for summary

[6] Accord, Farr v. Gruber, 950 F.2d 399, 401 (7th Cir. 1991); Sullivan v. Carrick, 888 F.2d 1, 4 (1st Cir. 1989).

judgment"; self-serving, unsupported allegations are insufficient. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986). A movant may support a motion under Rule 56 by pointing out to the trial court that, after a sufficient period for discovery, the plaintiff has no evidence to support an essential element of his or her case. Celotex Corp. v. Catrett, 477 U.S. 317, 331-32 (1986).

In the District Court, Petitioners demonstrated that Respondent had presented no evidence to support a finding that her First Amendment rights were in fact chilled. Specifically, Respondent testified that (1) she continued handing out all of her leaflets on April 27 and 28, 1988, (McIntyre Dep. at I-97-98); (2) she continued campaigning vigorously in opposition to the tax levies, (id. at I-120-22, 131, III-24); (3) she actively attended board meetings (id. at I-120); and (4) she even ran twice for a seat on the Westerville School Board. (Id. at IV-14-15.) Indeed, she admitted:

> Q: Is there anything that you didn't do; anything you said, "Well, gee, I'd like to do this," or "I should do this," or "I usually do this, but I'm not going to do that now because I feel threatened because of what Husarik and/or Hayfield did to me on April 27th and 28th, 1988"?
>
> A: Not to my knowledge.

(Id. at I-122) (attached hereto as Appendix D). Respondent failed to cite, either in the District Court or before the Sixth Circuit, any record evidence to refute this unequivocal admission that her First Amendment rights were never chilled. Cf. Mozzochi v. Borden, 959 F.2d at 1178-79 (no evidence that plaintiff's speech activities were "chilled" when they continued unabated after his arrest and criminal prosecution). Indeed, there is no such evidence, nor will any be adduced at trial, given the fact that Respondent is now deceased and there is no other source of admissible evidence to establish "chilling" in fact. The complete failure of evidence on an essential element of Respondent's case required the Sixth Circuit, under binding Supreme Court precedent, to affirm the District Court's order granting summary judgment to Petitioner on this claim.

Additionally, the record evidence does not support any claim that Dr. Husarik ever confiscated Respondent's leaflets. To the contrary, Respondent alleged that only Mr. Hayfield took materials from her. Specifically, Respondent asserted that Mr. Hayfield "grabbed" leaflets on April 27, 1988, but not the following night, and that the Petitioners "attempted" to "confiscate" her leaflets the following night when "they asked me to give them to them." (McIntyre Dep. at III-84-85) (Appendix D). It is manifest that merely asking for materials does not constitute confiscation. Accordingly, the undisputed record evidence requires that the District Court's order granting summary judgment for lack of injury in fact to Respondent must be reinstated.

V. CONCLUSION

For the reasons set forth in this brief, Petitioners Dr. Ernest Husarik and Mr. J. Michael Hayfield, respectfully request that, if the constitutionality of Ohio Rev. Code § 3599.09, is affirmed, the Court summarily reverse the decision of the Sixth Circuit and remand this case for entry of judgment in conformity with the decision of the District Court. In the alternative, it is respectfully submitted that qualified immunity should be granted to Dr. Husarik and Mr. Hayfield and the order of the District Court granting summary judgment to Petitioners on Respondent's " chilling" claim should be affirmed on the basis that the Respondent failed to make the requisite showing in support of her claim. Accordingly, Dr. Husarik and Mr. Hayfield request this Court to grant their Petition and to affirm the District Court's order granting summary judgment on the issues of qualified immunity and on Respondent's "chilling" claim.

Respectfully submitted,

James P. Burnes
Drew H. Campbell

Counsel for Petitioners,
Dr. Ernest Husarik and
Mr. J. Michael Hayfield

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

MAUREEN HANSEN, et al.,
Plaintiffs,

-v-

Case No. C-2-89-607
JUDGE SMITH

WESTERVILLE CITY SCHOOL DISTRICT
BOARD OF EDUCATION, et al.,
Defendants.

OPINION AND ORDER

Plaintiffs bring this action under 42 U.S.C. S1983 and state law. They assert claims of deprivation of Constitutional rights, false arrest and malicious prosecution, and assault and battery. Plaintiffs' base their claims, inter alia, on defendants' alleged misconduct in interfering with plaintiffs' efforts to oppose a local property tax levy. This matter is before the Court on the motion for summary judgment filed by the

Board Defendants (Doc. 45)[1]. Also before the Court is the Board Defendants' motion to strike/notice of objection.[2]

I.

This action concerns plaintiffs' efforts, and the Board Defendants' alleged interference with plaintiffs' efforts, to oppose proposed school property tax levies that appeared on the ballot in May, August and November 1988. The first two levies failed; the third passed.

A. Plaintiff McIntyre's Distribution of Leaflets on April 27 and 28, 1988

On April 27 and 28, 1988, plaintiff Margaret McIntyre distributed leaflets opposing the proposed levy. She did so while on Westerville School property, viz., two middle schools.

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[1] The Court has already granted the Police Defendants' summary judgment motion. The Court will, however, address or clarify a number of matters relevant to the Police Defendants' motion in this opinion.

[2] The Board Defendants assert that the affidavits plaintiffs submitted with their memorandum contra contain inadmissible hearsay, legal conclusions, speculation, conclusions not based on personal observation, and the like. The Court agrees that the affidavits are flawed in these respects. The Court also agrees with plaintiffs, however, that it is not necessary to literally "strike" the affidavits pr any portions thereof. The Court will simply disregard those portions that are improper.

On April 27, McIntyre handed out leaflets on a sidewalk outside of Blendon Middle School. Board Defendants Husarik and Hayfield eventually arrived. McIntyre apparently gave a leaflet to Hayfield. He says that after reading the leaflet, he told McIntyre that it violated election laws because it did not identify the source of the information it contained. McIntyre avers that Husarik and Hayfield threatened to call the police. Husarik and Hayfield deny this. McIntyre also alleges that Hayfield "snatched my leaflets out of the hand of my son's girlfriend." McIntyre affidavit, para. 9. Plaintiffs do not dispute that McIntyre continued to distribute leaflets after Husarik and Hayfield had gone inside the school.

The next day, on April 28, plaintiff McIntyre again distributed leaflets, but at a different school, Walnut Springs Middle School. McIntyre again gave Hayfield a leaflet. Hayfield maintains that as before, he read the leaflet and told McIntyre that the leaflet violated election laws. He says that McIntyre said she understood the law and that she continued to hand out leaflets. McIntyre contends that Hayfield again threatened to call the police. McIntyre affidavit, para. 12.

Plaintiffs do not dispute that the Ohio Elections Committee later found that McIntyre's pamphlets violated election laws.

B. The September 12, 1988 School Board Meeting

Several of plaintiffs' claims concern plaintiff Gordon Rood's efforts to speak at the September 12, 1988 Westerville School Board meeting.[3] Plaintiffs claim that the Board improperly interfered with Rood's free speech, and that they later filed false criminal charges against him for disrupting a lawful meeting.

Rood, as well as a number of the other plaintiffs, attended the September meeting. The meeting included a public participation period. Before the public participation period began, Board Defendant Miller announced that the Board would limit the public participation period to forty-five minutes. Five people spoke during this period. A number of the speakers opposed the levy. Rood did not seek to address the board during this period. When the public speaking period was over, Miller announced that the Board would take a five minute break and continue with the next item on the agenda.

After the recess, Miller again stated that the Board would be moving on to the next item on the agenda. Plaintiff Gordon Rood then interrupted the meeting, insisting that the Board continue to allow spectators to speak. The Board declined to do so. Rood then began to pace back and forth in

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[3] Most of the September 12, 1988 Board meeting was videotaped, and a copy of the videotape has been submitted as a joint exhibit. The Court has viewed the tape in its entirety.

front of the podium for more than two and one-half minutes. In doing so, he prevented Chris Wanner, Director of Pupil Services, from making his presentation as scheduled. in response to Rood's conduct, the Board mistakenly voted to adjourn the meeting.

The meeting eventually resumed. Miller then stated that the Board would allot another fifteen minutes for public participation after the scheduled agenda was completed. Rood, however, again interrupted the meeting, insisting that spectators be allowed to speak at that time. This interruption lasted about two minutes.

During this second interruption, plaintiff Hansen approached the podium and, without having been recognized, began to speak. The Board ruled her out of order. She nevertheless continued to speak. The Board permitted her to complete her comments.

After Hansen was done, the scheduled speaker, Chris Wanner, again tried to make his presentation. Rood, however, interrupted Wanner and prevented him from making his presentation by refusing to yield. After about one minute, a Westerville City Police Officer escorted Rood from the meeting hall.

The Board allowed an additional period of public participation after the meeting. Rood, as well as four other people, then addressed the Board without further incident. Of the ten people who spoke during the public participation period on September 12, 1988, five opposed the levy.

Several months later, the Board filed a criminal charge of disrupting a lawful meeting against Rood with respect to his conduct at the September 12 meeting. The prosecutor provided the city of Westerville with a letter on January 6, 1989, in which he expressed his opinion that probable cause existed to charge Rood with disrupting a lawful meeting based on the videotape of the September 12, 1988 meeting. After plea bargaining, Rood entered a plea of no contest to the lesser offense of disorderly conduct. Municipal Judge Sheward, however, found Rood not guilty after viewing the videotape.

C. The October 24, 1988 School Board Meeting

The Board changed its public participation policy in response to the events of the September 12, 1988 meeting. The Board announced at its September 26, 1988 meeting that beginning on October 10, 1988, anyone who wanted to speak to the Board would have to complete a sign-up sheet. The Board also stated that it would begin strictly to observe the five minute limit for individual speakers and the forty-five minute time limit for the participation period. The Westerville Board of Education "Communique" of September 26, 1988 and a local newspaper both announced the new policy.

Several of the plaintiffs, including Huffman and Rood, indicate in their deposition testimony that they were aware of and understood the policy. Plaintiffs Bresee, Ward,

Bean, Huffman, D. Waggoner, Hansen and Rood all filed out sign-up sheets for the public participation periods scheduled for the October 10 or 24, 1988 meetings.

The Board implemented the policy, without incident, at the October 10, 1988 meeting. Plaintiffs Bean, Hansen, Huffman, Rood and D. Waggoner spoke at the October 10 meeting pursuant to the policy.

Plaintiffs Rood, Huffman, Hansen and Waggoner attended the October 24, 1988 meeting. More people signed up for the public participation period for that meeting than there was time allotted. Board Defendant Miller announced this fact to the spectators at the beginning of the public participation period. He also told them that because of the circumstances he would lean toward recognizing people who had not spoken before. No one voiced an objection to Miller's approach at that time.

Twelve speakers then addressed the Board: six who were for the levy and six who opposed it. Miller then announced that there was time for two more speakers. He recognized Del Waggoner (husband of plaintiff Lou Waggoner), an opponent of the levy, and a Mr. Sandman.

After the anti-levy person concluded his remarks, plaintiff Huffman approached the podium and began to speak without having been recognized. Board Defendant Miller ruled Huffman out of order. Huffman, however, refused to yield the podium and continued to speak. After a few moments, Police Defendant Tiburzio approached Huffman

and asked him several times to leave. Huffman then voluntarily left with Tiburzio. As the two approached the chamber doors, Tiburzio informed Huffman that he was placing him under arrest for disrupting a lawful meeting.

As soon as Huffman and Tiburzio left the podium, plaintiff Rood approached the podium and began to speak.[4] Defendant Miller ruled him out of order. Rood nevertheless remained at the podium and continued to speak. Police Defendant Tiburzio then approached Rood and asked him to leave. Rood refused to do so, indicating that he wanted to read something to the Board. Tiburzio then attempted to lead Rood out of the chambers, holding Rood's arm. Rood repeatedly tried to pull away from Tiburzio. He shouted "get your paws off me" more than once.

After removing Huffman and Rood from the meeting, Tiburzio, by that time joined by Police defendants Bailey and Smith, arrested Rood and Huffman. The Police Defendants charged both Rood and Huffman with disrupting a lawful meeting, and charged Rood with an additional charge of resisting arrest.[5] There is absolutely no evidence from which a

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[4] Rood had not signed up to speak at the October 24, 1988 Board meeting.

[5] To the extent it may have been unclear in the Court's previous opinion, the Court finds that as a matter of law probable cause existed for charging Rood with resisting arrest. This finding is based upon the competent evidence contained in the record, including that portion of Rood's conduct recorded on the jointly submitted videotape of the October 25, 1988 meeting.

reasonable trier of fact could infer that any of the Board Defendants planned or directed the arrest of Huffman or Rood, or the filing of charges against them in connection with the October 24, 1988 Board meeting.

The meeting continued after Tiburzio led Rood and Huffman away. After the last speaker finished his comments, defendant Miller stated that the public comment portion of the meeting was over. Plaintiffs Hansen and L. Waggoner then tried to address the Board. Plaintiff Waggoner had not completed a sign-up sheet as required by the Board's policy. Miller ruled Hansen and L. Waggoner out of order. Waggoner responded by acknowledging that she was out of order. Police Defendant Tiburzio eventually approached Hansen and Waggoner and asked them to leave. They complied and left without incident.

Once outside the meeting, the Police Defendants apparently prevented number of the plaintiffs to reentering.[6]

In June 1989 a jury found plaintiffs Huffman and Rood not guilty on all charges stemming from the October 24, 1988 Board meeting.

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[6] To the extent it may not have been clear in the previous opinion, the Court finds that given the disruptive behavior of Rood, Huffman, Hansen and Waggoner, a reasonable officer in the circumstances would not believe that his actions violated plaintiffs' clearly established rights.

D. The Street Protest of October 29, 1988

Plaintiffs argue that the Board Defendants were somehow responsible for or involved in the actions of Police Defendant Ross on October 29, 1988. On that day, plaintiffs Carl Huffman and Jerry Bresee were demonstrating against the tax levy at the corner of Schrock Road and State Street. Ross approached the two in responding to a dispatch. The dispatch indicated that several individuals were creating a disturbance at that location.

The Court finds that there is absolutely no evidence from which any rational trier of fact could infer a connection between any of the Board Defendants and the conduct of Ross on October 29, 1988.

II.

The procedure for granting summary judgment is found in Fed. R. Civ. P. 56(c), which provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The evidence must be viewed in the light most favorable to the nonmoving party. Adickes v. Kress & Co., 398 U.S. 144 (1970). Summary judgment will not lie if the dispute about a material fact is genuine; "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Summary judgment is appropriate, however, if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); see also Matsushita Electric industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986).

The Sixth Circuit Court of Appeals has recognized that Liberty Lobby, Celotex and Matsushita have effected "a decided change in summary judgment practice," ushering in a "new era" in summary judgments. Street v. J.C. Bradford & Co., 886 F.2d 1472, 1476 (6th Cir. 1989). The court in Street identified a number of important principles applicable in new era summary judgment practice. For example, complex cases and cases involving state of mind issues are not necessarily inappropriate for summary judgment. id. at 1479. in addition, in responding to a summary judgment motion, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" Id. (quoting Liberty Lobby, 477 U.S. at 257). The nonmoving party must adduce more than a scintilla of evidence to overcome the summary judgment motion. id. it is

not sufficient for the nonmoving party to merely "'show that there is some metaphysical doubt as to the material facts.'"

Id. (quoting Matsushita, 475 U.S. at 586). Moreover, "(t]he trial court no longer has a duty to search the entire record to establish that it is bereft of a genuine issue of material fact." id. That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact.

III.

A.

The Board Defendants first argue that they are entitled to summary judgment on plaintiffs' claim of "civil conspiracy." They assert that plaintiffs have not pleaded such a claim with requisite particularity in the complaint, and that there is, in any event, no evidence to support such a claim.

The Court agrees that the complaint does not fairly plead a conspiracy claim. More importantly, however, plaintiffs have adduced nothing more than unsupported innuendos and conclusory allegations with respect to their conspiracy claim. The Police Defendants are entitled to summary judgment in connection with plaintiffs' claim of civil conspiracy.

B.

The Board Defendants next argue that they are entitled to summary judgment with respect to the claims arising out of the events of April 27 and 28, 1988. As the Board Defendants correctly point out, even according to plaintiff McIntyre's account of the incident, Board Defendants Husarik and Hayfield did not threaten to arrest or prosecute McIntyre. Rather, they allegedly told her they were going to call the police. plaintiffs do not dispute that McIntyre did not stop handing out leaflets after the alleged threat, but continued to remain on the school property passing out her materials as long as she desired. There is no evidence that the incidents "chilled" her speech in any way.[7] It is not disputed the police were never called to the scene on either occasion.

The alleged "grabbing" of pamphlets likewise did not seem to interfere with McIntyre's activities. it apparently did not cause her to run out of pamphlets. Furthermore, McIntyre alleges that the pamphlets were grabbed not from her, but from her son's girlfriend. McIntyre's son's girlfriend is not a plaintiff in this action.

Lastly, although perhaps not dispositive of this issue, it is worth noting that the Ohio Elections Commission ultimately ruled that McIntyre's leaflets did, in fact, violate the law. Under these circumstances, the Court concludes that plaintiffs have failed to come forward with sufficient evidence to establish any constitutional violation in connection with the events of April 27 and 28, 1988. The

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[7] Indeed, the undisputed evidence demonstrates that McIntyre's political activities have remained extensive.

Board defendants are therefore entitled to summary judgment on all of plaintiffs' claims arising from these incidents.

C.

The Board Defendants next argue that they are entitled to summary judgment with respect to plaintiffs' claims that the Police Defendants barred them from reentering the meeting after the arrest of Huffman and Rood. The Court agrees that plaintiffs have failed to adduce any competent evidence linking the Board Defendants with the Police Defendants' decision to prevent some of the plaintiffs from reentering the meeting. Defendants are therefore entitled to summary judgment in connection with these claims.

D.

The Board Defendants also contend that summary judgment should be granted in their favor on claims arising from the October 29, 1988 street protest. The Court finds that there is no evidence to link the Board Defendants with this incident. They are therefore entitled to summary judgment with respect to plaintiffs' claims arising from this incident.

E.

The Board Defendants further assert that as a matter of law, the Board's public participation policy was a constitutionally valid time, place and manner regulation. The Court finds that there is no evidence that the policy was

discriminatorily applied. indeed, the undisputed evidence shows that the Board was careful to give equal time to pro- and anti-levy forces during the public participation period. it is also worth noting that the Board gave many of plaintiffs ample Opportunity to speak at other Board meetings. There is no evidence that the Board Defendants prevented plaintiffs from utilizing other avenues of expression.[8]

It cannot seriously be argued that the policy did not serve a compelling governmental interest in preserving order at the Board meetings. Even if the Court were to conclude that the policy was flawed in some respect,[9] it would nevertheless find that there is no evidence that any such flaw was the reason plaintiffs were prevented from speaking at the October 24, 1988 meeting. In particular, the Court finds that as a matter of law, the forty-five minute time limit and the limit of five minutes per person were constitutionally valid regulations. The Court also fails to detect any per se constitutional infirmity with Miller's decision to give preference to people who had not yet spoken. Plaintiffs have not introduced any evidence that Miller did not choose people who had not yet addressed the Board. For all of these

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[8] The plaintiffs stress the importance of the October 24, 1988 Board meeting, pointing out that it was the last meeting before the November election, and that it was televised. This is undercut somewhat by plaintiffs' failure to allege that they were unable to themselves secure, during this period, access to air time on the same channel that broadcast the meetings.

[9] It appears that the policy required prospective speakers to provide a brief outline of their comments.

reasons, the Board Defendants are entitled to summary judgment on this issue.

F.

The Board Defendants also contend that they are entitled to summary judgment on plaintiffs' false arrest claims. Specifically, the Board Defendants maintain that there is no evidence to support plaintiffs' allegation that the Board was somehow involved with or responsible for Pólice Defendant Tiburzio's decision to arrest plaintiffs Huffman and Rood.

Plaintiffs rely heavily on a hand motion or "signal" Husarik apparently gave Tiburzio. This signal for help, however, falls far short of evidence that the arrests were prearranged. Plaintiffs have failed to adduce any competent evidence that any of the Board Defendants were either involved in or responsible for Tiburzio's decision to arrest Huffman and Rood. The Board Defendants are therefore entitled to summary judgment on these claims.

G.

The Board Defendants further argue that they should be granted summary judgment on plaintiffs' malicious prosecution claims relating to the charge filed against Rood in connection with the September 12, 1988 meeting. The Board Defendants maintain that Miller relied upon the advice of counsel in bringing the charge of disrupting a lawful meeting, and that there was, in any event, probable cause for such a charge.

The Court has viewed the jointly submitted videotape of the September 12, 1988 Board meeting. The Court finds that there was, as a matter of law, probable cause for the filing of a charge against Rood for disrupting a lawful meeting. See O.R.C. §2917.12.

Ohio courts recognize "advice of counsel" as a defense to claims of malicious prosecution. See Bacon v. Patera, 772 F.2d 259, 265 (6th Cir. 1985) (applying Ohio law); Donohue v. Burd, 722 F.Supp. 1507, 1520 (S.D. Ohio 1989) (same); Killilea v. Sears, Roebuck & Co., 27 Ohio App. 3d 163, 499 N.E.2d 1291 (1985).

> Advice of a lawyer is a complete defense to an action for malicious prosecution if the defendant made a full, fair and complete disclosure to a lawyer of all the material facts of which the defendant had knowledge, necessary to obtain accurate legal advice, and tending to prove or disprove the criminal charge, and if the criminal case was filed thereafter in reliance and in good faith on the advice of that lawyer.

Donohue, 722 F.Supp. at 1520.

The Court further finds that the undisputed evidence conclusively establishes that the charge was filed with the advice of counsel after a full, fair and complete disclosure. For the above reasons, the Board Defendants are entitled to summary judgment on plaintiffs' malicious

prosecution claims arising from the charge filed against Rood for disrupting the September 12, 1988 Board meeting.

H.

The Board Defendants next argue that they are entitled to summary judgment on plaintiffs' malicious prosecution claim arising out of the charges filed in connection with the October 24, 1988 Board meeting. These charges were filed by the Police Defendants.

The Court finds that plaintiffs have failed to adduce any competent evidence from which a reasonable trier of fact could infer that any of the Board Defendants either directed or were otherwise involved in the filing of the criminal charges against Rood or Huffman stemming from the October 24, 1988 Board meeting. Moreover, the Court has already found that probable cause existed for the filing of these charges. The Board defendants are therefore entitled to summary judgment on these claims.

I.

The Board Defendants also maintain that they are entitled to immunity under O.R.C. §§2744.03(A)(l),(2) and (3)[10], and 2744.03 (A) (6)[11]. The Court finds that the

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[10]That section provides in relevant part:

(A) In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to persons or property allegedly caused by any act or

omission in connection with a governmental or proprietary function, the following defenses may be asserted to establish non-liability:

(1) The political subdivision is immune from liability if the employee involved was engaged in the performance of a judicial, quasi-judicial, prosecutorial, legislative, or quasi-legislative function.

(2) The political subdivision is immune from liability if the conduct of the employee involved, other than negligent conduct, that gave rise to the claim was required by law or authorized by law, or if the conduct was necessary or essential to the exercise of powers of the political subdivision of the employee.

(3) The political subdivision is immune from liability if the action or failure to act by the employee involved that gave rise to the claim of liability was within the discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the office or position of the employee.

[11] That section states in relevant part:

In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to persons or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability:

(6) in addition to any immunity or defense referred to in division (A) (7) of this section and in circumstances not covered by that division, the employee is immune from liability unless one of the following applies:

(a) His acts or omissions were manifestly outside the scope of his employment or official responsibility;

complained-of conduct clearly falls within the purview of O.R.C. §2744.03.

Furthermore, plaintiffs have failed to adduce any competent evidence to controvert the Board Defendants' assertions that they did not act recklessly, in bad faith, or with malice. The Court finds that there is no evidence in the record from which a rational trier of fact could infer that any of the Board defendants acted with this level of culpability. The Board Defendants are therefore entitled to the immunity afforded by O.R.C. §§2744.03(A) (1), (2) and (3), and 2744.03(A)(6) as a matter of law. immunity under these sections applies only to plaintiffs' state law claims.[12]

J.

The plaintiffs concede that to the extent an underlying claim does not exist, a party cannot recover damages 'for emotional distress. The Board Defendants are entitled to summary judgment on plaintiffs' claims of emotional distress because plaintiffs' underlying claims are subject to dismissal on other grounds.

(b) His acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;

(c) Liability is expressly imposed upon the employee by a section of the Revised Code.

[12] The Board Defendants concede that immunity under O.R.C. § 2744.03(A) (6) does not, by definition, apply to plaintiffs' claims of malicious prosecution.

K.

Plaintiffs also concede that they may not recover punitive damages against any of the Board Defendants in their official capacities. The Board Defendants are therefore entitled to summary judgment to the extent the complaint asserts such a claim.

L.

The Board Defendants next argue that defendants Miller, Hayfield and Husarik are entitled to qualified immunity. Plaintiffs have sued these defendants in their individual capacities.

The perimeters of the qualified immunity defense as it currently exists were established in Harlow v. Fitzgerald, 457 U.S. 800 (1982). Under Harlow, government officials are immune from liability for civil damages insofar as their conduct does not violate clearly established constitutional or statutory rights of which a reasonable person would have known. 457 U.S. at 818. Whether an official will prevail in his qualified immunity defense depends upon the objective reasonableness of his conduct as measured by reference to clearly established law. Id. The qualified immunity standard is purely objective, and the official's subjective state of mind is irrelevant. Davis v. Scherer, 468 U.S. 183 (1984). Whether the law at the time of the alleged action was clearly established in favor of the plaintiff and whether the defendant is protected by qualified immunity are questions of law for the

court to decide. Ohio Civil Service Employees Assoc. v. Seiter, 858 F.2d 1171 (6th Cir. 1988)

"[W]hether an official protected by qualified immunity may be personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, ... assessed at the time it was taken." Anderson v. Creighton, 483 U.S. 635, 639 (1986) (quoting Harlow v. Fitzgerald, 457 U.S. at 819, 818)

The Operation of this standard, however, depends substantially upon the level of generality at which the relevant "legal rule" is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of Harlow. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. Harlow would be transformed from a guarantee of immunity into a rule of pleading. Such an approach, in sum, would destroy the balance that our cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties, by making it impossible for

officials [to] anticipate when their conduct may give rise to liability for damages. . . . It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence a more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, . . . but it is to say that in light of pre-existing law the unlawfulness must be apparent.

Anderson V. Creighton, 483 U.S. at 639-40 (cites, quotes and footnote omitted). Thus, "the proper inquiry is not whether the claimed right existed in the abstract, but whether a reasonable official would have known that the challenged conduct violated that right." Gossman v. Allen, 950 F.2d 338, 341 (6th Cir. 1991).

The Court finds that in the circumstances presented in this case, reasonable officials in the positions of Miller, Hayfield and Husarik would not believe that there actions violated any clearly established rights the plaintiffs may have had. it is not sufficient that plaintiffs First and Fourth Amendment rights may have existed in the abstract. The Court holds that Miller, Hayfield and Husarik are entitled to qualified immunity as a matter of law.

M.

The Board Defendants also assert that defendant Miller is entitled to absolute legislative immunity for claims pertaining to the manner in which he conducted the subject Board meetings. The Board Defendants admit, however, that the U.S. Supreme Court has never expressly afforded this immunity in this kind of case. Because Miller is entitled to summary judgment on other grounds, the Court declines to reach this issue. If it were to reach the issue, however, this Court would be inclined to extend immunity to the circumstances presented in this case. See Collison v. Gott, 895 F.2d 994, 1005-10 (4th Cir. 1990) (concurring opinion by Wilkinson, J.).

N.

The Board Defendants next argue that the defendant Board is entitled to summary judgment because plaintiffs have failed to state a claim against the Board under Monell v. Dept. of Social Services, 436 U.S. 658 (1978). The Board is entitled to summary judgment on other grounds, so it is not necessary to reach this issue. The Court would note, however, that Miller was arguably acting pursuant to a Board policy, namely the public participation policy. On the other hand, there is no evidence that the conduct of Hayfield and Husarik was pursuant to any custom or policy of the Board.

0.

Lastly, the Board Defendants assert that defendants Miller, Hayfield and Husarik are entitled to summary judgment with respect to plaintiffs' claims for punitive

damages. The Court finds that plaintiffs have failed to adduce competent evidence from which a rational trier of fact could infer that defendants Miller, Hayfield or Husarik acted with callous or reckless disregard for plaintiffs' rights. These defendants are therefore entitled to summary judgment on plaintiffs' punitive damages claims.

IV.

Based on the foregoing, the Board Defendants' motion for summary judgment (Doc. 45) is GRANTED. The clerk shall enter a final judgment in favor of all defendants, against plaintiffs, dismissing plaintiffs' complaint with prejudice. Costs shall be taxed against plaintiffs.

IT IS SO ORDERED.

GEORGE C. SMITH, JUDGE
UNITED STATES DISTRICT COURT

Nos. 93-3231/3303

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MAUREEN HANSEN, et al.,	)	
	)	ON APPEAL FROM
	)	THE UNITED
Plaintiffs-Appellants,	)	STATES DISTRICT
	)	COURT FOR THE
	)	SOUTHERN
	)	DISTRICT OF OHIO
v.	)	
	)	
	)	
WESTERVILLE CITY SCHOOL DISTRICT, BOARD OF EDUCATION,	)	
	)	
	)	
Defendants-Appellees.	)	

BEFORE: **NELSON**, **SUHRHEINRICH** and **BATCHELDER,** Circuit Judges.

PER CURIAM. This is a civil rights case, based in part upon alleged First Amendment violations, in which the plaintiffs appeal from a summary judgment in favor of the defendants. Upon de nova review, we conclude that summary judgment was not appropriate with respect to two of the plaintiffs' claims -- one arising from the alleged exclusion of opponents of a school tax levy from a public meeting of the

defendant school board, and the other based on the alleged confiscation of literature opposing the levy. We shall affirm the judgment of the district court as to the plaintiffs' remaining claims.

The plaintiffs, residents of Westerville, Ohio, were members of an organization called Citizens Against Tax Waste ("CATW"). This organization opposed a series of tax levies proposed by the Westerville City School District Board of Education.

On April 27, 1988, the board held an informational meeting at a local school. When they arrived at the meeting, defendants Ernest Husarik, superintendent of schools, and J. Michael Hayfield, assistant superintendent, encountered plaintiff Margaret McIntyre. With help from her teenage son and his girlfriend, Mrs. McIntyre was distributing flyers opposing the latest levy proposal. The distribution took place in front of a school building. Dr. Husarik and Mr. Hayfield allegedly "snatched" some flyers from one of the teenagers and informed Mrs. McIntyre that the flyers violated Ohio's election laws.[1] They also told Mrs. McIntyre that it was

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[1] The flyer was later held to be in violation of Ohio Rev. Code §3599.09 because it did not include the name and address of the organization or person responsible for it. In 1993 the Ohio Supreme Court ruled that this statute did not violate Mrs. McIntyre's free speech rights. McIntyre V. Ohio Elections Comm'n, 67 Ohio St.3d 391, 618 N.E.2d 152 (1993). The United States Supreme Court has since granted certiorari in the case. 114 5. Ct. 1047, 62 U.S.L.W. 3550 (Feb. 22, 1994).

illegal to distribute her materials on school property and that she must leave the premises. The school officials are said to have threatened to call the police, but did not do so. Mrs. McIntyre continued to distribute the materials, and she left when the board meeting began. A similar incident took place a day later.

At a public meeting of the school board held on September 12, 1988, Dr. Donald Miller, the then president of the board, announced that 45 minutes would be allotted for public participation. Each speaker, he said, would be given five minutes. (Although the board had not previously limited public comment at its meetings, controversy over the proposed levies had recently led to unusually high attendance; the August meeting had evidently run until after midnight, and as many as 60 people had spoken at that meeting.) Only five members of the public were initially recognized to speak on September 12, but because each of them spoke for more than five minutes, they consumed all the allotted time. At the end of the 45 minutes Dr. Miller announced the conclusion of the public participation period.

Following a recess, Dr. Miller stated that the board would move to the next item on the agenda. At this point Gordon Rood, one of the plaintiffs, insisted that additional spectators be permitted to address the board. (Mr. Rood himself had not asked to be heard during the public participation period.) Dr. Miller ruled Mr. Rood out of order, but Rood continued to pace about the podium and declaim loudly, insisting that "we'll talk until we're heard."

After a temporary adjournment, Dr. Miller announced that the board would allow an additional 15 minutes for public comment at the end of the meeting. Mr. Rood again interrupted and announced that the meeting would not continue until the people who wished to speak were permitted to do so.

At this point plaintiff Maureen Hansen approached the podium and began to speak without having been recognized. Although ruled out of order, she continued to talk. The board allowed her to complete her remarks. Following Ms. Hansen's comments, Mr. Rood again objected to the board's proceeding to the next agenda item. Westerville City Police Officer Richard Tiburzio, one of the defendants, then ejected Mr. Rood from the meeting for a time.

An additional opportunity for public participation was provided at the conclusion of the meeting, with five more speakers, including Mr. Rood, addressing the board. Of the 11 spectators who were heard that night, at least five were members of CATW.

Several months later, City of Columbus Chief Prosecutor James Fais watched a videotape of the September 12 meeting and concluded that there was a basis for charging Gordon Rood with disturbing a meeting in violation of Ohio Rev. Code §2917.12. Based on this conclusion, Dr. Miller filed such a charge in a state court. Mr. Rood entered a plea of no contest to a reduced charge of disorderly conduct, but the state court ultimately acquitted him, based primarily on its

review of the videotape. Mr. Rood now contends that Dr. Miller's filing of the charge constituted malicious prosecution.

Prior to a public board meeting scheduled for October 24, 1988, the board made arrangements to have Officer Tiburzio present. According to Officer Tiburzio, Dr. Husarik indicated that he wanted to make sure that there was no breach of the peace and that there were no problems between pro-levy and anti-levy people. The plaintiffs allege that Husarik and Tiburzio agreed in advance on a hand signal that would indicate that Tiburzio was to remove somebody from the meeting. Officer Tiburzio denies that they pre-arranged any hand signals, and there is no evidence that they did so.

According to Mr. Rood, Dr. Miller phoned him prior to the October 24 meeting and indicated that "he would allow all persons who wanted to speak the opportunity to address the Board on October 24, 1988." Dr. Miller has neither confirmed nor denied that he gave Mr. Rood this assurance.

The board had instituted a new public participation policy under which the floor would be open for 45 minutes of public comment and those who wished to speak would be required to sign up in advance. The plaintiffs knew of this procedure and understood that compliance was necessary in order to be recognized to speak. Except for Jerry Bresee, all of the plaintiffs attended the October 24 meeting; most of them were wearing CATW buttons.

Because of the large number of people who had signed up to speak, Board President Miller announced at the

beginning of the public comment period that there was insufficient time to accommodate everyone. Preference, he said, would be given to those who had not spoken at a previous board meeting.

After 47 minutes of public comment, during which time 11 people addressed the board, Dr. Miller announced that time would permit only two more speakers. He identified Del Waggoner, a CATW member and husband of one of the plaintiffs, and Jack Sandman, a levy supporter, as the two who would be recognized. Upon the conclusion of Mr. Waggoner's remarks, but before Mr. Sandman had spoken, plaintiff Carl "Pete" Huffman took the podium to ask a question. Mr. Huffman requested two minutes, and although ruled out of order, he refused to yield. Dr. Husarik motioned for Officer Tiburzio, who radioed for backup from the police department. Officer Tiburzio then approached Mr. Huffman, escorted him out, and placed him under arrest for disturbing a lawful meeting. A jury subsequently acquitted Mr. Huffman.

Immediately following Mr. Huffman's departure, Mr. Rood, who had not signed up to speak, took the podium and refused to yield. Officer Tiburzio placed his hand on Rood's arm to guide him from the meeting. Mr. Rood pulled away from Officer Tiburzio and yelled "Get your paws off me" as the two left the room. In the foyer outside the auditorium Mr. Rood struggled with Officer Tiburzio and several other police officers, including Randall Bailey and Ted Smith. Officers Bailey and Smith have both been named as defendants. Mr. Rood was arrested for disturbing a lawful

meeting and for resisting arrest. He too was subsequently acquitted by a jury.

Several of the plaintiffs had followed Huffman and Rood to the foyer. After the arrests were made, they returned to the meeting as Jack Sandman was completing his statement. Plaintiff Maureen Hansen then approached the podium and asked that everyone who had signed up to speak be permitted to do so at the end of the meeting. She was ruled out of order, and Officer Tiburzio escorted her from the room. As Ms. Hansen left the auditorium, several of the plaintiffs left the meeting for a second time to observe the activities in the foyer.

The group then reentered the auditorium and plaintiff Lou Waggoner took the podium. She was ruled out of order, and three police officers escorted her to the foyer, followed again by several of the plaintiffs. The plaintiffs allege that Officer Tiburzio asked those who were in the foyer, including several who had not spoken at all during the meeting, to leave the building. He allegedly threatened them with arrest if they reentered the meeting. The plaintiffs thereupon left the building.

The final episode at issue in this action occurred on October 29, 1988, when plaintiffs Carl Huffman and Jerry Bresee carried placards at a busy intersection in Westerville protesting Huffman's treatment at the hands of the police and the school board. They allege that while they were carrying their signs, defendant Police Officer Don Ross and another unidentified officer approached them in a threatening manner

and demanded that they identify themselves. They were not arrested.

In July of 1989, 12 plaintiffs filed this action in the United States District Court for the Southern District of Ohio. Named as defendants were the school board and its members; Officers Tiburzio, Smith, Bailey, and Ross; and the City of Westerville. The complaint alleged violations by all defendants of 42 U.S.C. §1983, based on alleged violations of the plaintiffs' rights under the First, Fourth, and Fourteenth Amendments of the United States Constitution; false arrest and malicious prosecution by the board and Officer Tiburzio with regard to Rood and Huffman; assault and battery by Officers Tiburzio, Smith, and Bailey against Mr. Rood; and assault and battery by Officer Ross against Mr. Huffman and Mr. Bresee.

On February 19, 1993, the district court entered summary judgment in favor of all defendants as to all counts. Eleven of the plaintiffs have appealed the district court's order.[2]

To prevail on a motion for summary judgment, the moving party must "show that there is no genuine issue as to any material fact and that the . . . party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary judgment is appropriate against a party who, having been

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[2] Plaintiff Lewis Hinkle did not appeal. Plaintiff Mcintyre died during the pendency of the appeal, and her husband, Joseph McIntyre, has been substituted for her as an appellant.

called upon to do so, fails to come forward with evidence tending to establish a disputed element of that party's case. See *Celotex Corp. V. Catrett,* 477 U.S. 317, 322 (1986). This court reviews summary judgment proceedings *de nova,* making all reasonable inferences in favor of the nonmoving party. *EEOC v. Univ. of Detroit,* 904 F.2d 331, 334 (6th Cir. 1990).

B

We turn first to the claims against the police officers and the City of Westerville. The officers are charged with having committed the state-law torts of assault and battery, false arrest, and malicious prosecution, in addition to having violated the plaintiffs' federal constitutional rights under the First and Fourth Amendments, as made applicable to the states by the Fourteenth Amendment.

1. State Claims

The only claim involving Officer Ross is an alleged assault and battery against plaintiffs Jerry Bresee and Carl Huffman. Bresee and Huffman allege that Officer Ross approached them in a "threatening" manner and demanded to know their names. They say he held his nightstick in his hand, but they do not assert that he touched them, made a motion as if to touch them, or threatened to touch them.

Under Ohio law, tortious assault is a willful threat or attempt to harm which reasonably places another in fear of harmful contact. The threat or attempt must be coupled with

a definitive act by one with the apparent ability to do the harm. *Smith v. John Deere Co.*, 83 Ohio App.3d 398, 406, 614 N.E.2d 1148, 1154 (Franklin Co. 1993).

The plaintiffs have identified neither all actual threat reasonably placing them in fear of harm nor an accompanying definitive act. No reasonable trier of fact could find that the holding of a nightstick constituted assault. In the absence of any evidence that Officer Ross acted maliciously, recklessly, or in bad faith, moreover, he is immune from liability in any event. See Ohio Rev. Code § 2744.03(A)(6). The district court properly granted summary judgment in favor of Officer Ross.

We next consider a claim by Gordon Rood that his treatment at the hands of Officers Tiburzio, Bailey, and Smith after the meeting of October 24 constituted assault and battery. Mr. Rood stated that the officers were "very rough with [him]" and that he was pushed into a wall and forced down to his knees. Witnesses state that they saw the police "jostle," "attack," or "shove" him. He claimed he suffered "great pain" and that be still suffers pain from the attack; the doctor who examined him concluded that he had pulled some muscles.

The police do not deny using force to arrest Mr. Rood, but they maintain that it was necessary to effectuate the arrest. They contend that Mr. Rood was "struggling" and "out of control" and that they had to use force to restrain him. Mr. Rood admits that he pulled away from Officer Tiburzio, that he yelled "get your paws off me," and that he

"struggled" with the police, but he insists that he never tried to escape or harm them.

Mr. Rood has not offered any evidence to show that the officers acted maliciously, recklessly, or in bad faith. On the contrary, the evidence suggests that the officers, faced with an admittedly "struggling" arrestee, responded in an entirely proper manner. Although there is a dispute as to how much Mr. Rood struggled and how forceful the police were, the undisputed facts compel the conclusion that the police are immune from liability by reason of O.R.C. §2744.03(A)(6). Summary judgment was proper as to this claim.

Plaintiff Raymond Brown was knocked down by the police as they were pursuing Mr. Rood, and plaintiff Margie Bean claims that one of the officers stepped on her foot. Neither Brown nor Bean claims that the police acted intentionally, and there is no evidence of any actionable misconduct in this respect.

Finally, Gordon Rood and Carl Huffman assert claims of false arrest and malicious prosecution against Officer Tiburzio. These claims stem from the events at the October 24 school board meeting, when Tiburzio charged Mr. Rood with resisting arrest and charged both Mr. Rood and Mr. Huffman with disturbing a lawful meeting in violation of Ohio Rev. Code §2917.12. (Mr. Rood was also charged with -- and later acquitted of -- disturbing the September 12 meeting, but Officer Tiburzio did not arrest Mr. Rood on September 12 and was not involved in any way with the filing of that charge.)

The elements of malicious prosecution are (1) malice in instituting or continuing the prosecution, (2) lack of probable cause, and (3) termination of the prosecution in favor of the accused. *Trussell v. General Motor Corp.*, 53 Ohio St. 3d 142, 144, 559 N.E. 2d 732, 735 (1990). To maintain an action for false arrest, a plaintiff must show that he was unlawfully detained. *Harvey v. Horn*, 33 Ohio App.3d 24, 27, 514 N.E.2d 452, 454 (Franklin Co. 1986). In determining whether an officer had probable cause to make an arrest and file criminal charges, his conduct is to be analyzed ill light of the facts or circumstances known to him at the time. *McFinley V. Bethesda Oak Hasp.*, 79 Ohio App.3d 613, 616-17, 607 N.E.2d 936, 939 (Hamilton Co. 1992). The existence of a reasonable basis to believe that a crime has been committed is sufficient to defeat claims of malicious prosecution and false arrest. See *id.* at 620, 607 N.E.2d at 941. See also *State v. McCrone*, 63 Ohio App.3d 831, 835-36, 580 N.E.2d 468, 471 (Lorain Co. 1989); *Melanowski v. Judy*, 102 Ohio St. 153, 156, 131 N.E. 360, 361(1921). The issue is not whether a crime was actually committed, but whether a reasonable basis existed for believing the accused guilty of the crime. *McFinley*, 79 Ohio App.3d at 617, 607 N.E. 2d at 939.

In the case at bar it is undisputed that Mr. Rood and Mr. Huffman both held forth during the October 24 meeting after having been ruled out of order repeatedly, and their conduct unquestionably "interfere[d] with the due conduct of [the] meeting." See Ohio Rev. Code §2917.12. Our review of the videotape of the meeting persuades us that the

existence of probable cause to arrest and prosecute both men for disturbing a meeting is beyond dispute.

We also conclude as a matter of law that probable cause existed to arrest and prosecute Mr. Rood for resisting arrest. He admits that he pulled his arm away from Officer Tiburzio, told him to "get your paws off me," and struggled with the arresting officers. Summary judgment was proper as to the claims of false arrest and malicious prosecution against Officer Tiburzio.

2. 42 U.S.C. § 1983

We next turn to the plaintiffs' constitutional claims against the police officers and the city, raised under 42 U.S.C. § 1983. First, Gordon Rood contends that Officers Tiburzio, Bailey, and Smith used excessive force in arresting him on October 24, thereby violating his Fourth Amendment right to be free of unreasonable seizures. The district court found for the police officers on the ground of qualified immunity. We agree that the officers were entitled to summary judgment as to this claim, but we do not reach the qualified immunity issue, having concluded as a matter of law that the plaintiffs failed to establish that the officers' conduct violated their constitutional rights.

Claims that police officers used excessive force in the course of an arrest are analyzed under a "reasonableness" standard. *Graham v. Connor*, 490 U.S. 386, 395 (1 989). Assessment of the reasonableness of the force used is an objective inquiry that depends on the "facts and

circumstances of each particular case, including the severity of the crime at issue, whether the suspect pose[d] an immediate threat to the safety of the officers or others, and whether he [was] actively resisting arrest." *Id.* at 396.

Taking the evidence in the light most favorable to Mr. Rood, we assume that he did not try to escape policy custody; certainly his acquittal on a charge of resisting arrest would support that finding. He admits, nevertheless, that he pulled away from officers and "struggled" with them. Mr. Rood claims that the officers pulled his arms up behind his back and shoved him against a wall, causing him pain. Although this degree of force may have been unnecessary in hindsight, we conclude as a matter of law that it was not unreasonable.

"The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,' violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary in a particular situation. *id.* at 396-97 (citations omitted).

No reasonable juror could find, tinder the circumstances presented here, that an arresting officer acted unreasonably by pulling an admittedly struggling suspect's arms behind his back and pushing him against a wall. The district court properly granted summary judgment to Officers Tiburzio, Bailey, and Smith and the City of Westerville as to this claim.

Next, eight of the plaintiffs -- Sue Bresee, Margie Bean, Raymond Brown, Jack Keller, Margaret McIntyre, Maureen Hansen, Lou Waggoner, and Carolyn Ward -- maintain that after they left the October 24 meeting, Officer Tiburzio prevented them from reentering and thereby violated their First Amendment rights.[3] They allege that Officer Tiburzio identified them by their "CATW" buttons as people who would not be allowed in the meeting.

The plaintiffs had a right to attend this public meeting of the local school board. A school board meeting, when opened to the public, is a limited public forum for discussion of subjects relating to the operation of the schools. See *Madison Joint Sch. Dist. V. Wisconsin Employment Relations Comm'n,* 429 U.S. 167, 175 (1976). Although the government may place limitations on the time, place and manner of access to such forums, the restrictions must be con lent neutral and narrowly tailored to serve a significant governmental interest. See *Perry Education Ass'n V. Perry Local Educators' Ass'n,* 460 U.S. 37, 45-46 (1983).

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[3] This is the only claim raised by seven of the plaintiffs.

[U]nder the . . . First Amendment . . . government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views . . . . Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone." *Police Dept. of Chicago V. Mosley,* 408 U.S. 92, 96 (1972).

When a school board sits publicly to conduct public business and to hear the views of citizens, it may not discriminate among speakers on the basis of the content of their speech. See ***Madison*** *Joint Sch. Dist.*, 429 U.S. at 176.

In the instant case, it is clear that the school board had opened the meeting to the public and had solicited public comments at the meeting, albeit for a limited period of time. If, as the plaintiffs allege, Officer Tiburzio excluded the plaintiffs from the meeting solely because they wore buttons indicating their association with Citizens Against Tax Waste, his action would be an impermissible content-based restriction on the plaintiffs' right to express themselves in a public forum.

Although the time for oral expression had already ended when the exclusion allegedly occurred, the plaintiffs' wearing of CATW buttons constituted a "silent, passive expression of opinion." See *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 508 (1969). Such a symbolic act is protected by the Free Speech Clause of the First Amendment. See *id.* at 505. Notwithstanding the expiration of the time for speeches by members of the public,

the plaintiffs had a right to attend and to wear CATW buttons.

The district court dismissed this claim on the ground of qualified immunity. Under the qualified immunity defense, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."

Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Giving the plaintiffs the benefit of all reasonable inferences, we must determine "whether an objectively reasonable officer could have believed [the defendant's conduct] to be lawful, in light of the clearly established law and the information the. . . officers possessed.'" *Hall v. Shipley,* 932 F.2d 1147, 1151(6th Cir. 1991) (quoting *Anderson v. Creighton,* 483 U.S. 635, 641(1987)).

It was well established in 1988, when the cause of action arose, that members of the public had a right to attend a public school board meeting. See *Madison Joint Sch. Dist.*, 429 U.S. at 176; *Mosley,* 408 U.S. at 96. A reasonable police officer in the position of Officer Tiburzio would have known that he could not exclude members of the public from a school board meeting solely on the basis of their viewpoints. Therefore, we conclude that summary judgment should have been denied as to the claims against Officer

Tiburzio arising from his alleged exclusion of the plaintiffs from the October 24 meeting.[4]

The district court acted properly in granting summary judgment in favor of the City of Westerville as to this claim. A municipality cannot be held liable for the acts of an individual employee or official unless the individual acted pursuant to an official policy of the defendant body. *Monell V. Dept. of Social Services,* 436 U.S. 658, 691(1978). To establish municipal liability for an injury resulting from a municipal policy, moreover, the plaintiffs "'must identify the policy, connect the policy to the city itself and show that the particular injury was incurred because of the execution of that policy.'" *Coogan v. City of Wixom,* 820 F.2d 170, 176 (6th Cir. 1987) (quoting *Bennett V. City of Slidell,* 728 F.2d 762, 767 (5th Cir. 1984) (en banc), *cert. denied,* 472 U.S. 1016 (1985)). The plaintiffs have not produced any evidence indicating that Officer Tiburzio's decision to exclude people from the board meeting was part of a city policy of restricting access to public meetings.

Finally, the plaintiffs claim that the police and the school board conspired to prevent them from expressing their views. An action for civil conspiracy may be brought under 42 U.S.C. §1983. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970).

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[4] The plaintiffs have not alleged any facts indicating that the school board was involved in a decision to exclude them from the meeting. To the extent the complaint raises such a claim, summary judgment in favor of the school board was proper.

> "A civil conspiracy is an agreement between two or more persons to injure another by unlawful action. . . . All that must be shown is that there was a single plan, that the alleged coconspirator shared in the general conspiratorial objective, and that an overt act was committed in furtherance of the conspiracy that caused injury to the complainant." *Hooks v. Hooks*, 771 F.2d 935, 943-44 (6th Cir. 1985).

A complaint alleging a civil rights conspiracy must be supported by specific facts showing the "existence and scope of the alleged conspiracy." *Slotnick v. Staviskey*, 560 F.2d 31,33(1st Cir. 1977), *cert. denied*, 434 U.S. 1077 (1978). Nothing in the record of the case at bar supports a claim that the police conspired in any way to deprive the plaintiffs of their constitutional rights. Summary judgment was proper as to the police defendants and the City of Westerville on the claim of civil conspiracy.

C.

We next consider the plaintiffs' claims against the school board members in their individual and official capacities. An action against a government official in his official capacity is an action against the governmental entity he represents. See *Kentucky V. Graham*, 473 U.S. 159. 166 (1985). A municipality is a "person" subject to suit under 42 U.S.C. § 1983. *Monell*, 436 U.S. at 690. Ohio's local school boards are treated as "municipalities" as far as amenability to

suit is concerned. See *Mt. Healthy City Sch. Dist. Rd. of Educ. v. Doyle*, 429 U.S. 274, 280-81 (1977) (Ohio local school board is effectively a municipality, not a state, for Eleventh Amendment purposes).

As to Margaret McIntyre's claim that Dr. Husarik and Mr. Hayfield violated her First Amendment right to distribute literature opposing the school levy, it is not alleged that the actions of Husarik and Hayfield on the evening of April 24 were part of a school board "policy" of discouraging the distribution of campaign literature. See *Coogan V. City of Wixtom*, 820 F.2d at 176. We therefore construe this particular claim as one against Hayfield and Husarik in their individual capacities only.

To state a claim under 42 U.S.C. § 1983, the plaintiff must establish that (1) the defendants acted under color of state law and (2) the officials' conduct deprived the plaintiffs of a right secured by the Constitution or a federal statute. *West v. Atkins*, 487 U.S. 42, 48 (1988). A public official acts under color of state law when he has "exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" Id. at 49 (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)).

There is a genuine issue of material fact as to whether Hayfield or Husarik acted under color of state law during their confrontation with Mrs. McIntyre. In this confrontation, which apparently took place on school property, Hayfield and Husarik, who were public school officials, allegedly took

Mrs. McIntyre's flyers, told her to leave the school property, and threatened to call the police if she did not comply. A reasonable juror could conclude that the men were undertaking to act in an official capacity.

An issue of fact also remains whether the defendants' conduct deprived Mrs. McIntyre of her First Amendment right to free speech. Mrs. McIntyre sought to communicate her views about a public matter. This kind of communication "is entitled to the greatest constitutional protection." *Glasson V. City of Louisville,* 518 F.2d 899, 904 (6th Cir.), *cert. denied, 423* U.S. 930 (1975). The government may not seize presumptively protected expressive materials without a prior determination that the speech is unlawful. See *Fort Wayne Books, Inc. v. Indiana,* 489 U.S. 46, 66-67 (1989) (seizure of books inappropriate prior to judicial determination of obscenity).

The facts alleged in this case bear some similarity to those in *Glasson V. City of Louisville.* In *Glasson,* police officers seized a poster from Ms. Glasson because it was critical of the President of the United States. We held that the police officers' actions deprived Ms. Glasson of her First Amendment right because they interfered with her expressive activity on the basis of the content of her speech. Similarly, Mrs. McIntyre alleges that the defendants' conduct interfered with the expression of her political views and that the interference was motivated by the content of her speech.

A threat to call the police made for the purpose of dissuading Mrs. McIntyre from expressing her views on the

levy could have had a chilling effect on the exercise of her First Amendment rights. Where one is threatened with arrest or prosecution for exercising his right to expression, thereby chilling the exercise of that right, a constitutional violation may occur even without an arrest or prosecution. See *NAACP V. Button*, 371 U.S. 415, 433 (1963) ("The threat of sanctions may deter [the exercise of First Amendment freedoms] almost as potently as the actual application of sanctions"); *Sloman v. Tadlock*, 21 F.3d 1462, 1469 (9th Cir. 1994) (police officer violated plaintiff's First Amendment rights by issuing citations and warnings with motive of deterring plaintiff's expressive activity).

We note that in order to succeed at trial on such a theory, Mrs. McIntyre will have to establish that her expression was in fact deterred or chilled by the defendants' conduct. "Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm *Laird V. Tatum*, 408 U.S. at 13. See also *Macko v. Byron*, 760 F.2d 95, 97 (6th Cir. 1985) (§1983 plaintiff must establish an actual constitutional violation, not merely a threat of violation). Moreover, she must establish that the defendants threatened to call the police because of the content of her message and not merely because they were concerned about a violation of election laws. See *Sloman v. Tadlock*, 21 F.3d at 1469-70 (defendant's motive is relevant to ascertaining whether his conduct violated First Amendment); *Mozzochi v. Borden*, 959 F.2d 1174, 1179 (2nd Cir. 1992) (same).

Dr. Husarik and Mr. Hayfield argue that to the extent that their conduct may have violated Mrs. McIntyre's constitutional rights, they are protected by the doctrine of qualified immunity. We disagree. Mrs. McIntyre's right to distribute political literature was clearly established at the time of these events. We conclude that a reasonable school official would have known that he could not interfere with a citizen's campaign efforts against a tax levy by confiscating her materials and threatening to call in the police.

Gordon Rood maintains that the action of Dr. Miller, president of the school board, in filing charges of disrupting the September 12 meeting constituted malicious prosecution. But charges filed in good faith and in reliance on the advice of a prosecuting attorney who is aware of the known material facts cannot form the basis of a claim of malicious prosecution. See

Donohoe v. Burd, 722 F. Supp. 1507, 1520 (S.D. Ohio 1989), *aff'd,* 923 F.2d 854 (6th Cir. 1991). In the case at bar Columbus chief prosecutor James Fais viewed the videotape of the September 12 meeting, independently concluded that there was probable cause to file charges against Mr. Rood, and so advised Dr. Miller. Dr. Miller filed the charge in reliance on this advice. Although Mr. Rood was ultimately acquitted, the state court judge found it to be "a borderline case" -- and the advice of the prosecutor would 'provide a complete defense to the malicious prosecution claim in any event.

The plaintiffs challenge the Board's policy of limiting the number of speakers, limiting the duration of their comments, and giving preference to new speakers. We conclude that this policy was a permissible content-neutral restriction on the time, manner, and place of the plaintiffs' speech and did not violate the plaintiffs' First Amendment rights. Where regulation of speech is content neutral, is narrowly tailored to serve a significant governmental interest, and leaves open ample alternative avenues for communication, it is constitutionally valid. *Clark V. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). In this case, the board's policy did not limit speech based on its content. All speakers during the public participation period were required to comply with the policy, regardless of their viewpoint. The regulation affected the timing of the speech, not its content. The plaintiffs also had ample opportunity to express their views to the board. CATW members spoke at most school board meetings in 1988, and several levy opponents spoke during the October meetings.

Although the board instituted its new policy in late 1988, when there was significant controversy over the levies, there is no evidence that the policy was aimed only at CATW members. The policy was adopted after a series of board meetings at which an unusually large number of people wished to speak. Some of the meetings were disrupted, and others ran on at great length. The policy did not disproportionately limit the right of members of any particular group to speak.

The government has a significant interest in the orderly and efficient conduct of its business. See *Grayned v. City of Rockford*, 408 U.S. 104, 119 (1972) (city has compelling interest in undisrupted school session); *Jones V. Heyman*, 888 F.2d 1328, 1333 (11th Cir. 1989) (mayor's interest in controlling the agenda and preventing the disruption of public meetings is significant governmental interest); *Madison Joint Sch. Dist.*, 429 U.S. at 176 n.8 ("Plainly, public bodies may confine their meetings to specified subject matter . . . ."); *Wright V. Anthony*, 733 F.2d 575, 577 (8th Cir. 1984) (public hearing procedure limiting speech time to five minutes per speaker was a valid time, place, and manner restriction that served a significant governmental interest in conserving time and allowing others opportunity to speak).

"We are dealing not with words uttered on the street to anyone who chooses or chances to listen; we are dealing with meetings of the Norwalk City Council, and with speech that is addressed to that Council. Principles that apply to random discourse may not be transferred without adjustment to this more structured situation. . . . [A] city Council meeting is . . . a governmental process with a governmental purpose. The Council has an agenda to be addressed and dealt with. Public forum or not, the usual first amendment antipathy to content-oriented control of speech cannot be imported into the Council chambers intact."

White V. City Of Norwalk, 900 F.2d 1421, 1425 (9th Cir. 1990).

The public participation policy at issue in the instant case restricted the number of speakers and the amount of time each person could speak, but it did not limit the content of the speech or restrict the full range of expressive activity available outside the board meeting. The policy left open ample alternative opportunities for communication. The board held several meetings to hear public comment, and citizens were free to write or speak to board members outside the board meetings.

Other courts have upheld policies comparable to the one with which we are concerned here. See *Jones v. Heyman*, 888 F.2d at 1334 (upholding plaintiff's expulsion from city commissioner's meeting because plaintiff failed to follow established public participation procedures); *Wright v. Anthony*, 733 F.2d at 577 (upholding five-minute limit on public comments during a hearing). We conclude that the policy in this case was a permissible restriction on speech. Mr. Huffman and Mr. Rood clearly violated the policy, and the board did not act improperly by having them removed.

As to the remaining incidents -- Officer Tiburzio's preventing several of the plaintiffs from reentering the meeting, the arrests on October 24, and Officer Ross' alleged assault on October 29 -- there is no evidence linking the board to these events. The district court acted properly in granting summary judgment to the school board and its members as to all claims.

III

The judgment entered by the district court is **REVERSED** as to the claim that Officer Tiburzio improperly excluded plaintiffs from a public board meeting and as to the claims against defendants Hayfield and Husarik regarding seizure of the fliers. The judgment is **AFFIRMED** as to all other claims and all other defendants. The case is **REMANDED** to the district court for further proceedings not inconsistent with this opinion.

ALICE M. BATCHELDER, Circuit Judge, concurring in part and dissenting in part: Although I concur in most of this opinion, I must respectfully dissent from the finding that Dr. Husarik and Mr. Hayfield are not entitled to qualified immunity for their actions in regard to their confrontations with Mrs. McIntyre prior to the April 27 and April 28, 1988, informational meetings. The majority concludes that there are genuine issues of fact which prevent the granting of summary judgment on qualified immunity grounds, particularly the issue of whether the defendants' conduct actually deprived Mrs. McIntyre of her First Amendment right to free speech. I would hold that it did not, and that, although the conduct of these defendants was probably reprehensible, it was not unconstitutional.

It is undisputed that on each of these occasions these defendants took only some of McIntyre's pamphlets, that on at least one of these evenings they took no pamphlets from McIntyre herself, that they merely threatened to call the police but did not do so, and that neither of these defendants had either the power or the authority actually to arrest or prosecute McIntyre. The majority analyzes these facts under *NAACP V. Button, 371 U.S. 415 (1963); Glasson V. City of Louisville, 518* F.2d 899 (6th Cir.), *cert. denied, 423 U.S. 930 (1975); and Sloman V. Tadlock,* 21 F.3d 1462 (9th Cir.

1994). I believe that there are crucial distinctions between this case and each of those cited.

The principle from NAACP v. *Button* which the majority applies to this case is the Supreme Court's statement that "[t]he threat of sanctions may deter [the exercise of First Amendment freedoms] almost as potently as the actual application of sanctions." 371 U.S. at 433. But in that case the Court was not addressing the actions of someone who threatens to call the police. The quoted language is part of a paragraph which addresses a *statute's* inhibitory effect, and in that regard, the Court said,

> The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.

Id. (citations omitted). Here, the action which the majority describes as a threat of sanctions is the mere threat,

which was never carried out, by two school board members to call the police. This is simply not comparable to a statute which, if applied to plaintiff, would operate as sanction.

The majority opines that the facts in *Glasson V. City of Louisville* bear some similarity to the facts here. I disagree. In *Glasson,* it was the *police* who seized the plaintiff's only poster. Not only was the plaintiff in *Glasson* left without any graphic representation of the point of view she sought to express, she was deprived of it by the law enforcement authorities themselves, who had the power to arrest her if she resisted. But in the case before us, it is undisputed that only some of McIntyre's pamphlets were taken by the defendants, the defendants were not police or other law enforcement officers, and although the defendants threatened to call the police if McIntyre continued to pass out the leaflets, she did continue her activity, but they did not call the police.

Finally, in *Sloman v. Tadlock,* the Ninth Circuit addressed claims against both a police defendant and a civilian defendant. The defendant police officer in that case, motivated by the content of the plaintiff's political speech, had participated in the arrest of the plaintiff, who was not violating any law at the time. 21 F.3d at 1466. The court held that qualified immunity was not warranted because a reasonable jury could have found that the plaintiff's political activity was the motivating factor in the officer's decision to *issue warnings and citations,* that the warnings and citations were groundless, and that the officer's conduct had chilled the plaintiff's expression. Id. at 1470. The court further held that

the civilian defendant had actually *signed a citizen's complaint* that led to the arrest of the plaintiff, and that there were genuine issues as to whether the civilian defendant had acted in concert with the police and whether the civilian was motivated by the content of the plaintiff's political speech. Id. at 1474. But in the case before us, the defendants neither could issue warnings and citations nor did anything whatsoever to cause a warning or citation to be issued by the police.

I do not question that McIntyre's conduct was protected by the First Amendment. While I disagree with the majority's apparent disregard for the fact that the pamphlets McIntyre was passing out were in clear violation of an Ohio law which has not, even today, been held to be unconstitutional,[1] I do not believe that issue is dispositive here. And *I* assume, for purposes of this analysis, that defendants Husarik and Hayfield were clothed with state authority. What I cannot accept is the conclusion that these defendants' actions reasonably should have been viewed by them as violating McIntyre's First Amendment rights. McIntyre does not allege that the defendants left her with insufficient literature to cover the meetings effectively, and as noted above, she does not allege that she stopped passing out the literature either evening. The majority cites no precedent, and I have found none, that would support a holding that these school board members should have known that if they

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[1] The issue has been argued before the United States Supreme Court but no decision as of this date has been issued.

took *any* of McIntyre's materials they were violating her First Amendment rights.

Neither can I join in the majority's view that a threat to call the police, even when made by public school officials on public school property, is equivalent to a threat of arrest or prosecution, such that these school board members should have known that when they threatened to call the police they were violating McIntyre's First Amendment rights. It is, after all, the duty and function of the police to determine whether an arrest should be made or citations issued. I think we set an alarming precedent when we acknowledge the potential for § 1983 liability for merely calling the police. And in this case, the majority agrees that these officials may be found liable merely for threatening to call the police. In short, since I do not believe that any reasonable school board official should have known that when he took some of her leaflets and threatened to call the police, regardless of his motives in doing so, he was violating McIntyre's First Amendment rights, *I* would affirm the district court's judgment granting qualified immunity to these defendants.

Nos. 93-3231/3303

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MAUREEN HANSEN, et al.,	)	
	)	
Plaintiffs-Appellants,	)	
	)	
JOSEPH MCINTYRE; LEWIS HINKLE,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	ORDER
	)	
WESTERVILLE CITY SCHOOL DISTRICT, BOARD OF EDUCATION, ET AL.	)	
	)	
Defendants-Appellees,	)	
	)	
CITY OF WESTERVILLE,	)	
	)	
Defendant,	)	
	)	
ACLU OF OHIO FOUNDATION, INC.,	)	
	)	
Amicus Curiae	)	

BEFORE: NELSON, SHURHEINRICH, and BATCHELDER, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

you were going to be arrested?
A. Well, again, it was sort of like echo, you know.
Q. So they both said it?
A. What one said, the other seemed to repeat.
Q. And then about going in and calling the police, did they both say that or just one of them?
A. I'm not sure if Hayfield or Husarik said it, because at that point I had almost quit listening to them, because other people were coming in, and I was talking to other people as they were coming in, because they were reaching for the fliers.

So like I said, they were both walking right together, and one says, "We're going in to call the police." And I says, "Okay. Please do," or something like that. "I'll be" - - "I'm right here."
Q. So you don't recall which one said it or if both of them said it?
A. It might have been the same case where they both said it.
Q. You're not sure one way or the other?
But to the best of my memory, one of them said it, if not both. But they did say "we," so --
Q. Did you remain on the premises after they

went?
A. Yes, I did.
Q. Did you continue to distribute the leaflets?
A. Yes, I did.
Q. So it really didn't make any difference to you what they were saying, did it?
A. Well, they had a right to their opinion, I suppose.
Q. But it wasn't going to stop you from doing what you wanted to do?
Q. Was it?
A. No, it didn't.
Q. In fact, you did it the next night?
A. That's right.

- - -

Thereupon, a document was marked for the purpose of identification as McIntyre Deposition Exhibit No. 2.

- - -

BY MR. BURNES:
Q. Mrs. McIntyre, I'm going to hand you what's been marked as McIntyre Deposition Exhibit No. 2.
I'll note for the record that at the top handwritten is "Exhibit A," and that -- or actually --

A. Just two nights.
MR. VAILE: That's what he meant.
Q. And, in fact, Mrs. McIntyre, you, after April 27th and 28th, continued to attend board meetings, did you not?
A. Yes.
Q. Continued to seek to speak to the Board in public participation?
A. Yes.
Q. And Dr. Husarik was at those meetings; correct?
A. Yes.
Q. Mike Hayfield was at those meetings; correct?
A. Yes.
Q. That didn't stop you from trying to speak to the Board?
A. No.
Q. And you actively campaigned against the August 1988 levy?
A. Yes.
Q. And you actively campaigned against the November '88 levy?
A. Yes.

Q. And didn't -- The fact that Hayfield and Husarik had done these things that you said they did on April 27th and 28th didn't have any effect upon your willingness in wanting to go out and do those things, did it?
A. Well, I continued to go to the meetings.
Q. The question is that, your opposition -- And you were actively working in opposition to not only the May levy but the August levy and the November levy of the Westerville Board of Education; correct?
A. That's right.
Q. And when we say "you actively did that," you campaigned; you handed out leaflets; you talked to people; you went to meetings; you, I'm sure, did other thing in opposition to the levy. Correct?
A. That's correct.
Q. And you did all of that despite being -- feeling threatened by Husarik and Hayfield on April 27th, 28th; correct?
A. That's correct.
Q. Can you tell me one thing that you didn't do because you felt threatened by Husarik and/or Hayfield?
A. You want to clarify that?
Q. Uh-huh. I'm trying to determine whether

what the effect of this feeling threatened was; and part of that, I'm asking you if there's anything at all that you didn't do after April 27th, 28th because of what you alleged Dr. Husarik and Mr. Hayfield did on those two dates.

A. The threat and the embarrassment was already there the 27th and 28th. They -- Life goes on.

Q. My question is: Is there anything that you didn't do; anything that you said, "Well, gee, I'd like to do this," or, "I should do this," or, "I usually do this, but I'm not going to do that now because I feel threatened because of what Husarik and/or Hayfield did to me on April 27th and 28th, 1988"?

A. Not to my knowledge.

Q. And, in fact, you not only opposed the three levies in 1988 but you also ran for the Board of Education in 1989; correct?

A. That's true.

Q. And you also led an effort to repeal the levy that was passed in 1988, did you not?

MR. VAILE: I'm going to object relative to the relevancy as far as the -- that period of time is concerned.

MR. BURNES: So noted.

'88. No. It was '89.
Q. Okay.
A. I'm sorry.
Q. So then it was --
A. We've been talking about '88, so --
Q. That's fine. So you found out about the charge being filed in 1989, then?
A. Someone from the newspaper called me.
Q. I'm trying to focus on the year now. It was 1989?
A. '89.
Q. And to your recollection, you found out very shortly after the charge was filed, within days?
A. Probably, yes.
Q. And after receiving notification that the charge had been filed, you continued in your efforts to repeal the levy and to oppose the levy that was placed on the ballot in 1989 and to run for board office; correct?
A. That's correct.
Q. And, Mrs. McIntyre, you filed a number of charges against a number of people alleging election law violations, did you not?
A. That's correct.

No.
Q. Now, after -- Strike that.
Where was Mr. Huffman seated in respect to you during this meeting?
A. On the other side of the aisle, I believe.
Q. Approximately how many feet from you?
A. Seven.
Q. Did you talk to him at all before he got up and attempted to speak at this meeting?
A. No.
Q. How far were you from the podium, to the best of your recollection?
A. Two and a half, three feet.
Q. Was there anything between you and the podium?
A. No.
Q. So were you sitting in the front row, then?
A. Yes.
Now, tell me --
You were in the meeting at the time that the police officer approached Mr. Huffman at the podium?
A. Yes.
Q. Tell me what you recall happening.
A. What specifically?

of them?
A. Both.
Q. And was that one night or both?
A. Both.
Q. And what did they do to attempt to confiscate the other leaflets?
A. They asked me to give them to them.
Q. Anything else that they did to attempt to confiscate them?
A. Well, they reached out to take them.
Q. Both of them?
A. Hayfield, the first night; and Husarik, the second.
Q. Also alleges that they threatened you and the others with action including criminal prosecution and arrest.
Who were the others that were threatened?
A. My son and the friend who was with him.
Q. And let's talk about Blendon. Were they -- Were your son and his -- What's her name? Tiffany?
A. Yes.
Q. Did someone threaten them with action including criminal prosecution and arrest?
A. My daughter was with me the night at Walnut,

Do you have any facts or information that any board member or employee of the board of Education, which you understand to include Dr. Husarik and Mr. Hayfield, engaged in any vandalism to your house?

A. No proof, no.

Q. Is it your contention that any of these individuals did engage in vandalism to your house?

A. No.

Q. Referring you -- And I believe you still have the complaint in front of you. Referring you to page 4, paragraph 14, it alleges that defendants grabbed many of the leaflets and attempted to confiscate the others.

Did this -- First of all, did both Hayfield and Husarik grab leaflets from you?

A. No. just Hayfield.

Q. And did that occur both nights or just the one night?

A. Just the one night.

Q. And which was that? at Blendon or Walnut Springs?

A. Blendon.

Q. And as far as attempting to confiscate the others, was that both Hayfield and Husarik or just one

with Officer Tiburzio other than what you have explained today?
A. Personal contact?
Q. Yeah.
a. No.
Q. Okay. Anything that makes you believe that you -- that you have a claim against him?
A. Other than his violation of my rights.
Q. Which was what you have just described; is that correct?
A. Yes.
Q. Okay. After that evening, have you continued to be active in activities involving the school board?
A. What do you mean?
Q. Whether it be school levies or otherwise. Well, you just ran for school board, did you not?
A. Yes.
Q. o the fact that Officer Tiburzio told you to leave didn't keep you from running for school board.
A. That was three years ago.
Q. Okay. Was this last election, was that the first time you've run?
A. No, I ran in '89.

Q. You ran in '89 also. Have you continued to go in to school board meetings?
A. Not as frequently.
Q. But you do go?
A. Yes.
Q. Okay. do you -- have you continued to state your opinions or beliefs concerning issues involving the school board?
A. Yes.
Q. In terms of stating your opinions and belief, has that included speaking at school board meetings?
A. On occasion, yes.
Q. Okay. In what other manner have you stated your opinions and beliefs?
A. Quite often the newspaper calls me and asks me on -- my opinion on certain issues.
Q. Okay. So you've stated your opinion in several public forums, whether it be school board meetings or in the newspapers, you've stated your opinions to other people, I assume, outside of school board meetings?
A. Yes.
Q. Okay. And in campaigning, I assume that

Supreme Court, U.S.
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(2)

No. 94-1826

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

J. Michael Hayfield and Ernest A. Husarick,

Petitioners,

v.

Margaret McIntyre,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

This Petition for a Writ of Certiorari is the second one that has been filed that contests the decision of the United States Court of Appeals for the Sixth Circuit in *Hansen, et al., vs. Westerville City School District Board of Education, et al.*, Nos. 93-3231/3303, (initially decided on November 7, 1994, Petition for Rehearing denied on January 19, 1995). The first Petition was filed with this Court by the Plaintiffs-Appellants below and docketed on April 17, 1995 and has been assigned Case No. 94-1696. While different issues have been raised in both petitions, they are pieces of a complex whole.

Some of the facts that deal with the particular matter referenced by the Petitioners herein, were before the Court in *McIntyre v. Ohio Elections Comm'n*, No. 93-986, Decided April 19, 1995. *McIntyre* involved the distribution of anonymous handbills by the late Margaret McIntyre in front of public schools located in Westerville, Ohio on two successive evenings in April of 1988.

This matter involves the same basic facts, but some of the background and surrounding details in evidence here were not included in *McIntyre, supra*. The progression of *McIntyre v. Ohio Elections Comm'n, supra* through the Ohio courts prior to its acceptance by this Court, did not permit the inclusion of important details which are a part of the record here.[1] For example, this Court was not informed at the time that *McIntyre* was argued that on the evening of April 27, 1988 some of Mrs. McIntyre's leaflets were confiscated by then Assistant Superintendent J. Michael Hayfield, a Petitioner herein.[2]

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[1] Due to the specific issue raised in *McIntyre, supra* much of the background that is before the Court here was not germane to the issue either in the Ohio courts or this Court. Too, since the process was appellate in nature from the beginning of Mrs. McIntyre's involvement with legal counsel, there was scant opportunity to augment the record with facts not brought out during the truncated hearing before the Ohio Elections Commission.

[2] Importantly, Petitioner Hayfield admitted in deposition that "its possible" he may have made an effort to take these leaflets. (Note: References herein to the Joint Appendix in the Sixth Circuit are delineated Jt Apx.) Jt Apx at 1371-72.

Similarly, this Court was not told that Petitioners Ernest A. Husarik (the Westerville City School District Superintendent of Schools) and J. Michael Hayfield threatened to call the police if Mrs. McIntyre did not cease distributing leaflets and leave the school property.

Further, it was not pointed out that the filing of the complaint against Mrs. McIntyre in the Ohio Elections Commission by Petitioner Hayfield occurred while Gordon V. Rood and Carl H. "Pete" Huffman (Plaintiffs-Appellants below) were awaiting trial on charges of disturbing a lawful meeting. Mrs. McIntyre, who had become involved with the CATW (Citizens Against Tax Waste) group several months after the leafleting incidents, was scheduled to be an important witness for the defense in that trial. She had been present at the October 24, 1988 school board meeting when the two men were arrested and had witnessed firsthand most of the events that took place. Respondents believe that the timing of the filing was not an accident.

These important facts, and the many others delineated in the larger case in the courts below, paint a picture that underscores the importance of interpreting this incident within a framework which includes the overall panorama of a system that has, thus far, permitted public officials to unjustly threaten, coerce and discredit citizens whose only "crime" was disagreeing with the powers that be.

ARGUMENT

I. RESPONDENTS BELIEVE THAT THIS COURT SHOULD CONSOLIDATE THIS PETITION WITH THE PETITION IN 94-1696 AND GRANT CERTIORARI

The arguments put forth by Petitioners herein are based to a significant extent on the presumption that Ohio Revised Code § 3599.09 would be found to be constitutional by this Court. It was not. That statute was struck down in *McIntyre v. Ohio Elections Commission*, No. 93-986, decided April 19, 1995. There are, however, other arguments put forth by Petitioners that do not rely on the constitutionality of that statute which Respondents desire to address.

A. Qualified Immunity

Petitioners herein argue that the Sixth Circuit should have decided that the taking of Mrs. McIntyre's leaflets was reasonable, that its illegality could not have been known or anticipated by the Petitioners and, therefore, that the Petitioners should be granted qualified immunity.

Respondents disagree. The taking of Respondent McIntyre's political leaflets cannot be justified as a legitimate act when the very nature of the taking is contrary to generally accepted societal standards which hold that no one has a right to take something from another that is not freely given. Even Ohio Revised Code § 3599.09 failed to confer a right of confiscation on one who observed an infraction of the law against the "illegal" property of the "law breaker."

Petitioner Hayfield admitted that he read the leaflet and that he recognized it was in opposition to the levy. Jt Apx at 1363 and 1370. Petitioner Husarik spoke about the leaflet's content to the parents who participated in the meeting the night of April 27, 1988 and circulated a memo to the Board of Education members the following day in which he referred to the flyer's "inaccuracies." A copy of the memo appears as Jt Apx Page 1068. To the extent that the Petitioners were familiar with the leaflet's content, and felt

constrained to respond to its message, it is difficult to imagine that these two people, who were the highest ranking salaried employees of the Westerville City School District, simply could not understand that they were violating a citizen's First Amendment rights by confiscating her obviously political leaflet.[3] Respondents do not believe that the facts demonstrate that a "... 'legitimate question' as to whether an official's conduct constitutes a constitutional violation..." exists such that the Petitioners would be entitled to qualified immunity. *Wiley v. Doory*, 14 F.3d 993, 995 (4th Cir. 1994). Nor do Respondents believe that under the circumstances Petitioners could have possibly suspected that, in their role as 'reasonable officers,' (See *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).) they were not violating Mrs. McIntyre's First Amendment rights.

The court below stated that "a reasonable school official would have known that he could not interfere with a citizen's campaign efforts against a tax levy by confiscating her materials and threatening to call in the police." Sixth Circuit Opinion at B-23 of Petition Appendix. Respondents agree.

1) Suspicious Timing

Then Assistant Superintendent Hayfield stated in deposition[4] that he filed charges against Mrs. McIntyre with the Ohio Elections Commission a year after her "failure" to comply with Ohio Revised Code § 3599.09 because he saw yard signs [of hers] that demonstrated that she was still not complying with the applicable statute (see Hayfield deposition at pp. 132-136.).

If that statement was accurate, one could conclude that the filing against Mrs. McIntyre by Petitioner Hayfield came about as the result of a potent resentment held by the Assistant Superintendent or a strong personal difference between the two parties. In that view, it might not be considered anything of a sinister or malevolent nature. However, there is an obvious problem with Mr. Hayfield's

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[3] The fact that the leaflet was clearly contrary to the position that both of the officials supported makes the action even more suspect.

[4] Petitioner Hayfield's deposition was filed with the District Court below on October 23, 1992. No docket number was assigned.

explanation. The yard signs[5] that were supposedly the catalyst for the filing, did not appear in the Westerville area until several months after Petitioner Hayfield filed the original complaint.[6] It is, therefore, difficult to believe that Petitioner Hayfield filed his complaint because of errors in signs that he could not have even seen prior to the filing.

This significant discrepancy between the facts and the memory of Petitioner Hayfield is not the only example of Petitioner Hayfield's conflicting statements in this matter. During testimony taken before the Ohio Elections Commission Mr. Hayfield stated that "(a)fter the meeting we found most of the fliers were distributed in a wastepaper can, and I had the custodian in each meeting go through to see if we could find any piece of literature that had the names affixed to it." (Included in the Joint Appendix submitted to this Court in the McIntyre case at Page 41 and reproduced here as Page 1 of the Appendix.) During depositions taken in this case, Petitioner Hayfield clearly contradicted his earlier statement.[7] In this latter instance he flatly denied that he asked a custodian to go through the wastepaper baskets. Jt Apx at 1359.

These contradictions in testimony are reason to suspect that either Petitioner Hayfield could not remember what had taken place or was intentionally fabricating testimony to hide what he knew to be the truth.

Because it is clear that Petitioner Hayfield did not relate to Mrs. McIntyre's counsel the actual reason for filing the Ohio Election Commission complaint almost a year after her "illegal" action took place, but, offered, rather, a fabricated explanation, it is reasonable

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[5] As pointed out on Page 19 of the Petition herein, Mrs. McIntyre ran for the school board in 1989. As a part of that campaign she did have signs printed which were placed in the yards of school district residents.

[6] Mrs. McIntyre ran for the Board of Education in the fall of 1989 in conjunction with the general election in November. Under Ohio Revised Code § 3513.255, a candidate must file Petitions to place her name on the ballot not later than 4:00 p.m. of the seventy-fifth day prior to the general election. Her signs did not appear in the Westerville area until after her petitions were filed.

[7] The Ohio Elections Commission testimony was given on March 19, 1990. Petitioner Hayfield's deposition was taken on August 14, 1990, approximately five months later.

to ask what was the real reason for Petitioner Hayfield's delayed filing? There obviously was some purpose for the postponement.

If Petitioner Hayfield did not know or remember the reason, he could have stated that in deposition. Why make up a story? Ohio Supreme Court Justice Craig Wright, opined in his dissent that "(i)ndeed, in this case, it is possible that the very filing of the charge against McIntyre was in some measure in retaliation for her opposition to the school levy. Certainly, the timing of the filing is suspect." *McIntyre v. Ohio Elections Commission*, 67 Ohio St. 3d 391 (1993). Respondents agree.

2) Curtailing Illegal Activity

Petitioners have maintained throughout this case that their confrontations with Mrs. McIntyre on April 27 and 28, were based on their interest in making sure that no laws were being broken on school property.[8]

If Petitioners' statement is accurate and the main thrust of their actions was making sure nothing illegal took place on school property, why is the political persuasion of the "illegal" pamphlet notable?[9]

Respondents point to the reference in Petitioners' own Statement of the Case in their Petition wherein they describe the leaflets as being "in opposition to the levy." (Page 3) If "their sole motivation was to ensure there was not illegal activity occurring on school property," (Page 19 of Petitioners' Memorandum in support of their Motion for Summary Judgment, at Jt Apx Page 132), then why do Petitioners find it noteworthy to indicate which side of the levy issue the leaflet supported? Certainly, if the leaflet was "illegal," it was not due to the political position it espoused, but, rather, its lack of disclosure.

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[8] Respondents point out that this argument assumes the truth of the claim by Respondents that Petitioners both threatened Mrs. McIntyre with arrest if she didn't leave the grounds and took some of her leaflets.

[9] It is clear that Mrs. McIntyre's leaflet was undoubtedly anti-levy. It did not mince words in its recommendation when it asked those reading it to "Please Vote No - Issue 19." [See Footnote 2 in this Court's majority opinion in *McIntyre, supra.*]

Based on Petitioner's argument one would have to believe that Dr. Husarik and Mr. Hayfield would have confiscated and threatened to call the police if a citizen supporting their political position attempted to circulate a flyer which violated Ohio Revised Code § 3599.09 just as readily as they took that action against Mrs. McIntyre. However, based on the most rudimentary understanding of human nature, Respondents believe that a supporter of the levy would not have been threatened as was Mrs. McIntyre, nor would a supporter's leaflets have been seized.

Further, Respondents believe that at this point in the proceedings (i.e. the summary judgment stage), the facts in question are to be interpreted in favor of the non-moving party, *EEOC v. Univ. of Detroit*, 904 F.2d 331, 334 (6th Cir. 1990). In spite of the Petitioners' denial, such an interpretation would have to conclude that Petitioners' actions were based on the content of Mrs. McIntyre's flyer rather than its supposed illegality.

B. The No Harm, No Foul Philosophy

Petitioners argue further that because Mrs. McIntyre was not intimidated by their comments or actions that there was therefore no "chilling" and she has no case. Respondents acknowledge that Mrs. McIntyre was not dissuaded by the words and actions of Petitioners here (nor the words and actions of the other Respondents in Case No. 94-1696) from expressing her viewpoint. She fervently believed that she had a right to state her opinion and that it would be a mistake for her to run and hide or allow herself to be deterred from speaking because her views were not popular with those in positions of leadership and influence. But, that does not mean that Mrs. McIntyre's path was not strewn with more personal challenges than those of the average American who seeks to express a political opinion and is not threatened by those in positions of power.

The reason that threats[10] are effective in controlling the one threatened is because no one really knows when or if they will be carried out. It is like waiting for the proverbial "other shoe" to drop.

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[10] The Random House Dictionary of the English Language describes "threat" as "an indication or warning of probable trouble." p. 1369 of the 1968 College Edition, First Printing, Published by Random House, Inc., New York.

One is never free of the nagging thought that the threat could be carried out at any moment. That suspicion robs a person of concentration and peace of mind. Few persons look forward with great aplomb to confrontations even when they know (or believe) that they will prevail.

The passages from Mrs. McIntyre's deposition quoted by Petitioners show that she had a courageous spirit and that she forged ahead in spite of the threats, but they do not demonstrate that she was not threatened or that she did not feel threatened. In fact, she did indicate that she was more hesitant afterward about what she did. Jt Apx at 1459. She just did not let that stop her.

Petitioners' argument relative to Mrs. McIntyre (and in regards to all of the Respondents here [Plaintiffs-Appellants below]) is the same here as it has been for over six years. They say that because the Respondents were not threatened enough to have been discouraged from activity, that there is no harm. They ignore the fact that the Respondents felt these threats. They ignore the fact that the Respondents were required to function with the additional burden of knowing that the officials in question had the power and authority to carry out their threats and harass them - make their lives more complex and filled with additional stress far beyond that of the average person because they (the Respondents) were willing to oppose the position of those in power (the Petitioners). Certainly, the "trial" that Mrs. McIntyre went through over the distribution of a simple leaflet which opposed an additional tax on property[11] should be firm evidence that Petitioners could and did take unjustified and retaliatory action against the Respondents which caused them to expend great amounts of time, energy and financial resources to defend themselves and their basic rights as United States citizens.[12] Is there any question that this type of harassment produces levels of stress and tension in one's life that is uncomfortable and taxing?

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[11] As this Court is aware, Mrs. McIntyre's position on the levy was shared for a time by more than fifty percent of those casting ballots on this issue. The levy failed twice before it was approved the following November.

[12] Justice Stevens concluded this Court's *McIntyre, supra* decision with the following observation: "One would be hard pressed to think of a better example of the pitfalls of Ohio's blunderbuss approach than the facts of the case before us."

Taking on "City Hall" is a formidable and unpopular task that can hardly be characterized as enjoyable even with vindication.

The underlying propositional basis of the Petitioners' previous argument is that if the threat is not effective in controlling the one threatened it is innocuous and not actionable. The logic that follows from such curious reasoning suggests that when a threat is effective (i.e. the person feels intimidated and ceases her or his activity) there is no action taken against the perpetrator of the threat because by definition the victim has been immobilized (the threat was effective).

Conversely, when the threat is ineffective, and the "victim" refuses to comply with the perpetrator's desires and even brings the threat to light, the perpetrator can then cry "no harm, no foul."

Respondents acknowledge that there are cases that can be read to suggest that threats by public officials to use their power and authority or someone else's power and authority (that of the police) to dissuade a person from exercising a right (First Amendment or otherwise) granted to all the citizens of this country, is insufficient to state a claim for the violation of that person's constitutional rights.[13]

Respondents fervently believe that such a proposition, especially as it applies to threats and/or actions by public officials (here the two highest ranking officials of the Westerville City School District) is wrong.

No citizen of this country should have to be subjected to even one threat by a public official or officer to take action against her or him simply because the official disagrees with either the citizen's words or actions. This is especially true, where, as here, the citizen is exercising a constitutionally protected right to express a purely political opinion regarding an important issue of the day. If the accepted rule of law is that provided there are no immediately demonstrable untoward actions taken in furtherance of what is a "mere" threat, the citizen has no cause of action - the rule is harmful to both the dignity of the public office represented by the official and

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[13] Petitioners cited in footnote #2 both *Emmons v. McLaughlin*, 874 F 2d 351, 353 (6th Cir. 1989), and *Goldschmidt v. Patchett*, 686 F.2d 582, 585 (7th Cir. 1982) for that very proposition.

the practical benefits that every citizen should derive from the First Amendment.

Our forefathers who signed their names to the Declaration of Independence and mutually pledged to each other their "Lives" their "Fortunes" and their "sacred Honor," had an understanding of how damaging to the human spirit of a country's citizenry unbridled public officials, drunk with the power and authority of their office and imbued with the feeling of invulnerability, could be. To describe the "absolute Tyranny" perpetrated against the Colonists, the Declaration of Independence provided examples of the most objectionable actions and policies of the "present King of Great Britain." Included early on in that list is the claim that the King has "sent hither swarms of Officers to harass our people, and eat out their substance." This description was not an understatement of the effect that these puppet officials acting as "emissaries of the Crown" had upon the Colonists. Their threats and impertinent actions did indeed eat away at the substance and noble resolve of the people.

These servants of oppression were drunk with the power and authority of their office and imbued with the feeling of invulnerability. Our forefathers considered their actions objectionable, reprehensible and oppressive to the human spirit in spite of the fact that their deeds were in conformance with the edict of their master, the King.

When the debate raged in this country over the formulation and wording of a document that would protect all of its citizens from the abuses of the past, it was recognized by those great and inspired minds who formulated the codification of citizens' rights with the intent to permanently protect them from the brutalities endured by their ancestors, that not only must the public be effectively shielded from the abuses of a tyrannical ruler, but equally guarded from the tendency of the average citizen who, once appointed to a position of power, can become a victim of the temptation that allows that power to corrupt his generosity and tolerance in favor of iron-handed control and the submission of those "below" him to his absolute will. No longer were the men and women of this country to have to rely on the chance that those who "ruled" over them might be, by some stroke of good fortune or fate, benevolent dictators who would suffer

their subjects to exercise a modicum of freedom as long as they did not voice their open and hostile displeasure with the decisions of their "king." It was the absolute intention of the Framers and their counselors that the citizens of this country would be totally free of such abuses.

The "immunity" that is offered to public officials in their official capacity is there only to allow them to carry on the functions of their office unfettered by citizen abuses and unwarranted intrusion - and nothing else. The immunity is not offered to protect them from either the claims, or the anger of those whom they serve (not rule over), even when those officials only threaten to use the power and/or authority of their position to keep a citizen (any citizen) from exercising his or her right to contest the policy or position of any government official regardless of the importance or lack thereof of that official's public station. That threat is akin to, and representative of, the same harassment that the Framers decried.

No immunity should extend to those officials who misuse and dishonor their position by even suggesting that they have it within their authority and/or power to prevent any citizen from expressing their opinion on any issue whatsoever, when the method of that citizen's expression is by an accepted and time-honored peaceful process or procedure.

Respondents maintain that to the extent that there exists a policy of law that permits anyone to exercise, or threaten to exercise, with impunity the type of abusive authority and power that took place in this instance against Margaret McIntyre - that policy of law is wrong and should be changed.

To the extent that there exists within the lower courts in this country and among the general populace (which includes this nation's legal practitioners) a belief that the threat to unjustly use the power and/or authority of one's public office is a tolerable abuse, and not an absolute violation of the constitutional rights enjoyed by all persons, whatever their station in life - that belief should be eradicated.

Respondents ask this Court to grant the writs prayed for by the Petitioners and the Respondents by consolidating this case and Case No. 94-1696 for the reasons cited there and here, and to permanently

lay to rest any tendency by the courts in this country to minimize the abuse of the populace that occurs when public officials threaten a detractor with the intent of dissuading her or him in any way from voicing a political opinion.

II. THE LOWER COURT MISINTERPRETED THE IMPORTANCE OF THE INCIDENT HERE BY ISOLATING IT FROM THE LARGER PICTURE

What was said by the Sixth Circuit relative to Mrs. McIntyre's leaflets misses a very important point. The inclusion of the McIntyre scenario of April 27 and 28, 1988 in Respondents' joint action originally filed in the district court below against all of the Defendants-Appellees (Petitioners herein represent only two of the total), was to delineate an early example of the length to which the Petitioners, and their employer, the Westerville City School District Board of Education, were willing to go to eradicate and eliminate any vocal opposition to their pro-levy position. This "opening salvo" by these two public officials was the first of many heavy-handed attempts by the Defendants below to squelch the opposition. The acts described here were not aimed solely at Mrs. McIntyre, but all who dared to oppose the Board of Education's official position. It was an obvious and blatant example of the willingness of these Petitioners, and those allied with them, to trample on the constitutional rights of others to achieve what they believed to be justifiable ends.

Interestingly enough, but for the vendetta-type attitude of the Petitioners herein, and their effort to extract one more "pound of flesh" from Mrs. McIntyre almost one year after the incidents in question here took place (and five months after the Board of Education's third attempt to pass the levy had finally succeeded), this matter would have likely gone unreported and unnoticed. But here, as with most examples of autocrats overreaching their advantage,[14] they pushed too hard, too far and too much. They

[14] Our forefathers recognized the propensity of people to put up with a certain amount of abuse from authority when they stated in the Declaration of Independence "and accordingly all experience hath shown, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed."

failed to comprehend the tenacity and resolve of not only Mrs. McIntyre, but those other Respondents with whom she had become allied since that first night when she had stood at the school door handing out leaflets virtually alone, supported only by her teenage son and his girlfriend.

The initial McIntyre incident is prologue to the rest of the story, and it is important because it demonstrates a willingness on the part of the Petitioners to use unacceptable and abusive tactics to discredit those who oppose them. As this Court knows from *McIntyre, supra*, the Petitioners' actions did not stop on April 28, 1988. They covered close to a two year period.[15] Exoneration of Mrs. McIntyre for her "illegal" activity took more than five years. Mrs. McIntyre did not live to witness it.

In spite of this history, Petitioners still promote their righteousness in this matter as if they are the sacrificial lambs being led to the slaughter by a system which has mistakenly ignored their justifiable pleas emanating from the sanctum sanctorum of "qualified immunity." Respondents respectfully, but adamantly disagree with Petitioners' argument, and believe that the facts speak louder than any case law which may appear to support the Petitioners' position.

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[15] The hearing on the original filing by Petitioner Hayfield before the Ohio Elections Commission was held on July 17, 1989. The hearing on the July 25, 1989 refiling did not take place until March 19, 1990. Petitioner Hayfield drew salary from his employer (the Westerville City School District Board of Education) while attending that hearing. Jt. Apx. at 1375. His participation in the hearing process was known to and supported by Petitioner Husarik. Jt. Apx. at 1374-75.

CONCLUSION

No person should be denied the right to express his or her opinion. When government supports in any measure the "right" of any public official to play the part of "king" and bend the law to appear as though the public official has the right to be the ruler rather than the servant, then government and that public official have failed to understand the relationship that was established by those men and women who fought and died for the rights which we all enjoy as citizens of the United States of America.

This country was intended to be, and is, the pinnacle of individual freedom. No place on earth are the rights of the individual more sacred than here in America. If any group or person is permitted to set themselves or himself up as the determiner of what is right or best for the general populace, then they are destroying and can eliminate the freedoms which we, as a people, hold so dear.

Similarly, if through the niceties of the law, "understood" by only a relatively small handful of people who "practice" this art, the courts are permitted to turn a deaf ear to the cries of a people abused by their own elected and appointed officials who would deny them their inalienable rights, then individual freedom, as we know it, is not in the process of disappearing - it is already gone.

Petitioners herein, would have this Court support their right to abuse this country's citizens by threatening them and using the law to take retaliatory actions against them for daring to question Petitioners' authority or oppose their views. Petitioners would use the law that was put in place to protect them from unacceptable and unwarranted abuse to permit them to abuse others. This result cannot be the logical intention of "immunity" rulings and legislation. No one has the right to hide behind the law to bring about an unjust end. Yet, it seems clear that such an interpretation is not only possible, but given the argument by the dissent in the circuit court below, probable.

Respondents (Plaintiffs-Appellants below) believe that the points debated here and in the companion petition represent questions that churn at the soul core of our constitutional system. They are of the utmost importance. They ultimately affect some of the most basic

individual freedoms and rights - freedom of speech, the right to petition the government for a redress of grievances, trial by jury - rights inestimable to the individual "and formidable to tyrants only." Taken together these rights and others preserve for the people the ultimate freedom - freedom from the oppression of government.

For the reasons cited, Respondents pray that this Court will consolidate this case with case No. 94-1696 and that a writ(s) of certiorari will issue.

Respectfully submitted,

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(DISCUSSION OFF THE RECORD.)

MR. HAYFIELD: MR. CHAIRMAN, MAY I SPEAK, SIR?

MR. IGOE: I THINK WE'RE FINISHED --

MR. HAYFIELD: OKAY.

MR. IGOE: -- UNLESS YOU GOT SOMETHING ELSE, OTHER EVIDENCE, BUT EDITORIAL COMMENTS, I DON'T THINK WE --

MR. HAYFIELD: ONE COMMENT. AFTER -- THE ORIGINAL MEETINGS WE HAD SCHEDULED HAD NOTHING TO DO WITH THE CAMPAIGN. AFTER THE MEETING WE FOUND MOST OF THE FLIERS WERE DISTRIBUTED IN A WASTEPAPER CAN, AND I HAD THE CUSTODIAN IN EACH MEETING GO THROUGH TO SEE IF WE COULD FIND ANY PIECE OF LITERATURE THAT HAD THE NAMES AFFIXED TO IT. WE FOUND NONE, AND I SAW NO GOOD REASON TO SUBMIT BOXES OF LITERATURE TO YOU.

(DISCUSSION OFF THE RECORD.)

MS. WASHINGTON: IN THE CASE OF 89A-9, FIND NO VIOLATION OF OHIO REVISED CODE 3517.10(D), NO VIOLATION OF 3017.13(E), FIND A VIOLATION OF 3599.00 AND IMPOSE A FINE OF -- EXCUSE ME, 3599.09 AND IMPOSE A VIOLATION OF $100.

MS. MOSS: SECOND.

MR. IGOE: ALL IN FAVOR.

ALL COMMISSION MEMBERS: AYE.

MR. IGOE: THANK YOU.

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[Certificate Omitted in Printing]